No. 09-1310

IN THE

Supreme Court of the United States

JILL LINDSAY, *et al.*,
Petitioners,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS AND JOHN WARD, AS PRESIDENT OF APFA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below, after determining on the record presented and consistently with decisions of this Court that there was no basis for plaintiffs' claims that the Association of Professional Flight Attendants breached the federal duty of fair representation ("DFR") in its negotiation and ratification of a collective bargaining agreement aimed at forestalling a credible, imminent threat of a bankruptcy filing by American Airlines, correctly also determined that plaintiffs' state law claims, predicated upon the same facts as their unsuccessful DFR claims (which they no longer are pursuing), are preempted?

2. Did the court below, after reviewing the text and structure of the Railway Labor Act ("RLA") and applicable case law, correctly determine that individual employees cannot pursue claims against their employer that seek to invalidate a collective bargaining agreement (negotiated by their union and ratified by the employees) under the RLA "status quo" provisions, Section 2, First and Seventh, 45 U.S.C. § 152, First and Seventh?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondents Association of Professional Flight Attendants ("APFA") and John Ward, as President of APFA, hereby state that APFA is an unincorporated association, that John Ward, as President of APFA, is an individual, that neither APFA nor John Ward has any parent corporation, subsidiary or affiliate, and that no public company owns 10% or more of stock in either APFA or John Ward (there being no such issued stock).

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BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS AND JOHN WARD, AS PRESIDENT OF APFA

STATEMENT OF THE CASE

Following the catastrophic events of 9/11, American Airlines ("American" or "the Company") lost billions of dollars. By early 2003, with its condition rapidly worsening, the Company threatened to file for bankruptcy unless all three unions representing its employees (including respondent Association of Professional Flight Attendants ("APFA" or the "Union")) entered into and ratified highly concessionary agreements by a very tight, Company-dictated deadline,

and, if it filed for bankruptcy, to ground many aircraft, seek far greater concessions and furlough thousands more flight attendants than if it reached agreements outside of bankruptcy.

After the three unions' financial advisors concluded that the Company's bankruptcy threat was well founded, APFA's Board of Directors ("BOD"), its highest governing body, made a series of difficult decisions that it believed in good faith would best protect the American flight attendants' interests: (1) to negotiate a concessionary agreement with American (which became the "Restructuring Participation Agreement" or "RPA"); (2) to substitute an expedited 15-day telephonic member ratification process for the Union's normal 30-day mail ballot (in order to meet the Company's ratification deadline); (3) to accept American's offer to defer the threatened bankruptcy by one day in order to extend member balloting; and (4) to resolve a new dispute with American over executive benefits that arose after the RPA had been ratified and in the face of a renewed Company bankruptcy threat.

The thrust of plaintiffs' lawsuit was that these collective bargaining actions breached APFA's duty of fair representation ("DFR"), that American was a party to those breaches, and that the RPA should be vacated and the prior non-concessionary 2001 collective bargaining agreement (the "2001 CBA") should be restored. The Second Circuit unanimously affirmed the district court's determination, based on a detailed record and governing decisions of this and other Courts, that there was no basis for plaintiffs' claims. Among other things, the courts concluded that the circumstances then confronting APFA, including American's dire economic straits and bankruptcy

threat, "preclude any reasonable factfinder" from concluding that APFA's decisions related to the RPA negotiations and ratification were made "irrationally, arbitrarily, or in bad faith," and that plaintiffs' state law claims, based on the same allegations as the DFR claims, were preempted. Pet., pp. 21a-24a, 26a-29a (Second Circuit), 84a-90a (district court).[1]

Plaintiffs have now abandoned their DFR claims and seek review only of the dismissal of their state law claims (brought against APFA and American) and of certain claims brought against American under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*

1. The Facts

APFA's "industry-leading" 2001 CBA, obtained after years of negotiations with American, was overwhelmingly ratified by the APFA membership on September 12, 2001. Pet., p. 36a. There was no membership celebration, however; the previous day two American aircraft were hijacked and destroyed, and colleagues' lives were lost. JA-3522. In the aftermath of 9/11, American suffered billions in losses in 2001 and 2002. Pet., p. 37a. When American projected even greater losses in the first quarter of 2003, it demanded in February 2003 that the three unions representing Company employees[2] agree to massive concessions (including $340 million annually

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[1] "Pet., p. __" refers to the petition for a writ of certiorari. "Pet., p. __a" refers to the appendix annexed to the petition wherein the lower court opinions in this case are reproduced. "JA-___" refers to the documents in the joint appendix submitted to the court of appeals.

[2] The Allied Pilots Association ("APA") represents American's pilots; the Transport Workers Union ("TWU") represents certain American ground employees. Pet., p. 37a; JA-3485, JA-5119 (¶ 29).

from APFA) by March 31, and obtain membership ratification by April 15, or the Company would file for bankruptcy. Pet., pp. 38a-40a, 44a; *see* Pet., pp. 41a-42a, 45a; *see also* Pet., pp. 46a-47a (American intended to file for bankruptcy absent concessionary agreements). The financial advisors for all three unions, after a thorough review of Company and public data, concluded that an imminent bankruptcy filing was highly likely unless the unions agreed to the Company-mandated cost reductions and deadlines. Pet., pp. 40a-42a, 86a; JA-4042.

APFA decided to negotiate an agreement with American "in order to avoid [an American] bankruptcy," Pet., p. 40a, but before APFA agreed to the level of concessions the Company demanded (as did APA and TWU, *see* JA-2457, JA-5146 (¶ 67); JA-3505, JA-5125 (¶ 101)), it attempted, unsuccessfully, to negotiate "upsides" to partly offset the concessions, Pet., p. 46a, and considered American's dire financial condition, as well as the Company's bankruptcy plan, shared with APFA and the flight attendants, to seek, through rejection of the 2001 CBA (under Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113), 40% greater cost reductions ($470 million annually) and to furlough 2,500 more flight attendants than under an agreement reached outside of bankruptcy. Pet, pp. 40a-44a, 46a-47a, 84a-85a. And, before the BOD decided to conduct an expedited telephonic ratification vote under these unanticipated, emergency circumstances, it considered not only the views of those who drafted the APFA Constitution, Pet., pp. 49a-51a, but also that if it used a 30-day mail ballot, the vote would not conclude until after the Company had filed for bankruptcy, rendering the vote symbolic and meaningless. Pet., pp. 49a-51a; *see* JA-326; JA-3500-01; JA-3990.

Throughout the negotiations and ratification process, the APFA leadership kept its members fully informed with contemporaneous updates regarding the existing circumstances and the BOD's actions and reasoning. Pet., pp. 43a-44a, 51a-53a. Before the ratification balloting began, APFA provided its members with "a detailed description of the RPA's terms," Pet., p. 52a, making no effort to hide their "ugliness." JA-3591; JA-3546-47; Pet., p. 53a. (Nevertheless, APFA strongly recommended that flight attendants defer voting until they received final contract language, for which APFA was urging American's prompt agreement. Pet., p. 52a; JA-3501, JA-5121 (¶ 85); JA-3548).

Notwithstanding APFA's agreement to the RPA, subject to membership ratification, it thereafter pursued and obtained American's agreement to several improvements to lessen the RPA's impact (shorter duration, early reopening option, potential additional mid-term wage increases, earlier vesting of stock options), without providing any offsetting concessions to American. Pet., p. 53a.

Prior to April 15, APFA President Ward "consistently sought more [voting] time for APFA members" Pet., pp. 53a-54a, 85a-86a, but the Company refused to extend the deadline until finally, in the early morning on April 15, it offered a one-day extension. Pet., pp. 49a, 53a-54a. Ward considered the offer insufficient and did not accept it, *contra* Pet., pp. 29-30 n.21 (¶¶ 4-5), but agreed to refer it to the BOD for consideration. Pet., pp. 54a, 85a. By the time the BOD met later that day, it was aware that APA and TWU had ratified their RPAs and that, as of 10 AM on April 15, the APFA RPA had been narrowly rejected (9,842 "no" to 9,309 "yes"). Pet., p. 55a. The BOD carefully weighed the issues and alternatives, found

multiple compelling reasons why an extension—which the Union had been seeking all along—would further "the best interests of the membership" (as detailed in the district court's findings, Pet., pp. 55a-56a), and also determined to offer flight attendants the same option the other two unions had given their members to change their initial vote if they so desired. Pet., pp. 55a-56a, 85a-86a.[3] During the balloting extension, *all* members were afforded the opportunity to vote for the first time (approximately 1,300 did), to revote (either as they had previously or by changing their vote), or to refrain from voting (in which case their prior vote, if any, would be counted). Pet., p. 57a.

During the extension, the Company communicated to flight attendants regarding the continued prospect of a bankruptcy filing, as it had throughout and before the balloting period, which evoked an immediate protest by Ward. Pet., pp. 57a-61a.

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[3] Plaintiffs allege certain shortcomings with the ratification voting that all pertain to their now abandoned DFR claims, are irrelevant to the issues for which they seek review, and are contrary to the record. For example, *contra* Pet., pp. 29-30 n.21 (¶¶ 1-4), no one knew how any flight attendant voted and there is no evidence that vote "monitoring" was used in any way by APFA or motivated the Company to agree to RPA enhancements or offer to extend the balloting. JA-552; JA-599-601; JA-892; JA-3511, JA-5129 (¶ 128); JA-3670; JA-3675; JA-3725; JA-3736-37; JA-3807-10; JA-4013. Also, no evidence exists that the vote-change option "compromise[d] the vote's integrity" or that the BOD "knew" that it would, *contra* Pet., p. 4 n.1; *see* JA-4992-93 (¶¶ 89-91); on the contrary, the American Arbitration Association ("AAA"), which conducted the balloting, Pet., p. 51a, used extensive safeguards during the extension to ensure voting integrity. JA-524; JA-586; JA-727-28; JA-1253; JA-1264; JA-1271-73; *see* Pet., p. 57a.

At the conclusion of balloting on April 16, the final tally was 10,761 "yes" votes and 9,652 "no" votes,[4] the AAA certified the results, and APFA and American then considered there to be a ratified RPA. Pet., p. 57a; JA-1468.

The next morning, the press reported that the Company had provided executives with retention bonuses and funded a special bankruptcy-shielded retirement plan. Pet., p. 61a. APFA expressed its outrage for what it considered a deliberate Company failure to timely disclose this significant information to APFA and the flight attendants, JA-3512, JA-5129 (¶ 132), threatened to reballot the APFA membership on the RPA (as did TWU with its membership, JA-3684), and took steps to do so at an April 22 BOD meeting. Pet., p. 62a.

After an all-day meeting on April 23 among top officers of the Company and the three unions and four Texas Congressional representatives, the Company agreed to additional RPA improvements (further shortening the duration of the three RPAs, an even earlier reopening option, a new Annual Incentive Program more likely to result in payments to employees than the plan already included in the RPAs). Pet., pp. 62a-63a, 65a-66a; JA-3819-21. Due largely to insistence by all three unions, American's CEO (Don Carty) resigned on April 24. Pet., p. 63a. APA and TWU thereafter dropped any further challenge to finalization of their RPAs, but APFA did not. Pet., p. 63a; JA-3685. Instead, its officers met that

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[4] Plaintiffs' argument that votes cast during the extension were "void" and that only votes cast prior to the extension were "valid," Pet., pp. 4 n.1, 29-30 n.21 (¶ 5), rests on their (incorrect) contention that the BOD could not authorize a voting extension.

evening with the new American CEO (Gerard Arpey) and urged him to defer a bankruptcy filing until after APFA reballoted its membership on the RPA. Pet., p. 63a. Arpey refused. JA-3685-86. However, he agreed to a specific further change in the APFA RPA that the Union had been seeking, conditioned upon APFA's acceptance by the morning of April 25 and withdrawal of its decision to reballot the membership, absent which the Company would file for bankruptcy. Pet., p. 63a.

Faced once again with highly undesirable alternatives, the BOD determined, on the morning of April 25, to finalize the RPA without a further membership vote and to secure the RPA improvements to which the Company had agreed after APFA's reballoting threat (which, *contra* Pet., pp. 29-30 n.21 (¶ 8), did not require membership ratification because these additional changes were all beneficial to the membership and caused no "major changes" to pay or work rules). Pet., pp. 63a-66a; JA-779-80; JA-3529; JA-3933-34; JA-4064. The Letter of Agreement signed on April 25, by its terms, "resolve[d] all disputes which exist[ed] between [APFA and American] related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." Pet., p. 65a; JA-4138-41. The RPA was implemented in May 2003. Pet., p. 66a. It is this agreement, in effect for seven years, that plaintiffs seek to vacate and replace with the pre-existing 2001 CBA. JA-136.

2. Proceedings Below

Plaintiffs filed a 534-paragraph, 22-count class action complaint in which they challenged APFA decisions and American actions related to the negotiation and ratification of the RPA. JA-42-137. They alleged that APFA breached its DFR (five of their causes of

action) and violated its Constitution, the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401, *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*. They asserted claims against American for violations of the RLA, state law and RICO, and for its participation in APFA's purported DFR breaches. Plaintiffs sought to vacate the RPA, to resurrect the 2001 CBA, and hundreds of millions of dollars in damages.

(a) District Court

In March 2006, the district court dismissed the RICO claim, two of three LMRDA claims (plaintiffs subsequently withdrew the third), and all state law claims against American as preempted. Following extensive discovery, the parties filed summary judgment motions.

In July 2008, the court granted defendants' motions, denied plaintiffs' motion and dismissed as moot plaintiffs' class certification motion. In doing so, the district court followed the teachings of *Air Line Pilots Ass'n, International v. O'Neill*, 499 U.S. 65 (1991), and its progeny, that a union fulfills its DFR when it considers the existing factual landscape in determining how best to protect those whom it represents, that the union's judgment calls are not to be second-guessed, even if others, including courts, might disagree with them, that a union's constitution is not a straitjacket that bars a union from responding effectively to dire circumstances in order to protect its members, and that a union does not breach its DFR unless its conduct is "so far outside a 'wide range of reasonableness' as to be wholly irrational," discriminatory, or taken in bad faith, *id.* at 67. The district court applied these standards to the record

facts and determined that "[a]ll evidence indicates that APFA's motive was to avoid an American bankruptcy and thereby preserve its members' interests" and that "no reasonable jury could find" that APFA breached its DFR. Pet., pp. 88a-89a.

Among other things, the court found that: (1) APFA's actions were "rational" and neither arbitrary, in bad faith nor discriminatory, as the Union was "faced with the credible threat" that, if it did not reach and ratify a concessionary agreement by the American-required deadlines, the Company would file for bankruptcy and would furlough far more flight attendants and seek substantially greater concessions; (2) "APFA's acceptance of American's offer for an extension . . . cannot be viewed as arbitrary or in bad faith" because Ward "consistently sought more [ballot] time for APFA members to consider the proposed RPA"; and (3) there was "no evidence" that APFA's decision to enter the April 25 Agreement without membership ratification was "irrational," "fraudulent" or "invidious" as the Union acted on "its reasonable fear that American would file for bankruptcy in the absence of agreement." Pet., pp. 84a-86a.

The district court also concluded that because the allegations underlying plaintiffs' state law breach of Union Constitution claim were the same as those on which the DFR claims were based, the state claim was a "mere refinement" of the DFR claims and therefore "preempted by federal law." Pet., p. 90a.[5]

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[5] In a related case brought by former flight attendants for TWA Airlines (following American's acquisition of TWA), the lower court denied the plaintiffs' motion to enjoin implementation of the RPA, *Cooper v. TWA Airlines, LLC*, 274 F.Supp.2d 231 (E.D.N.Y. 2003), and subsequently granted summary judgment for APFA, finding that "APFA did not discriminate

(b) Court of Appeals

The Second Circuit unanimously affirmed the district court rulings. In accord with *O'Neill*, 499 U.S. 65, and like the district court, it evaluated the Union's conduct in light of the factual circumstances confronting the Union at the time it made its various decisions. It found, among other things, that: "the record is replete with evidence that American Airlines was, in fact, in dire economic straits at the time the parties entered into the [RPA] negotiations"; these "circumstances preclude any reasonable factfinder from concluding that APFA entered into the challenged negotiations with American Airlines irrationally, arbitrarily, or in bad faith"; the evidence would not "admit an inference of arbitrariness or bad faith in the [expedited] voting procedures used by APFA" given the "time-sensitive nature of the circumstances"; "APFA [had] sought an extension [of balloting] through the end of April" and there is "no record evidence that would permit a factfinder to identify bad faith in APFA's acceptance" of the Company's offer of a one-day ballot extension; and there was "no record support for plaintiffs' claim that APFA acted arbitrarily or in bad faith in finalizing the April 25, 2003" Agreement that provided various benefits to the flight attendants, as American informed the Union that "if it did not finalize the [RPA] by April 25, the airline would declare bankruptcy." Pet., pp. 26a-29a.

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against or act in bad faith with regard to the TWA flight attendants [in breach of the DFR] in the negotiation of the RPA or with respect to the ratification of that agreement," and that plaintiffs' state law breach of constitution claim was "preempted by federal law" because it was based on the same allegations, and thus a "mere refinement" of their DFR claim. *Cooper v. TWA Airlines, LLC*, 184 L.R.R.M. (BNA) 2801 (E.D.N.Y. 2008) (citation omitted). This decision was not appealed.

In affirming the lower court's ruling that the RLA preempted the state law breach of Union Constitution claim against APFA, the court of appeals first reviewed a "basic tenet[]" of federal labor law that "uniform" federal standards (for unions, the DFR standard), not various state laws, are to govern the conduct of an RLA union and carrier pertaining to the formation of a collective bargaining agreement ("CBA"). Pet., pp. 17a-21a. It then observed that plaintiffs' state law claim against APFA was based on the same allegations underlying their DFR claims. Accordingly, the Second Circuit concluded that the state law claim was preempted, lest it "'frustrate effective implementation of the [RLA's] processes'" for reaching CBAs by imposing "additional state regulation on core RLA [union collective bargaining] conduct," Pet., pp. 21a-22a (quoting *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969), and further citing *id.* at 381); *see also* Pet., pp. 16a-17a, 23a-24a, 29a (plaintiffs' related state law claims against American, which on appeal were all linked to the state law claim against APFA, were similarly preempted).

The court affirmed dismissal of plaintiffs' RLA claims against American that also sought to supplant the RPA with the 2001 CBA, JA-82-83 (¶¶ 223, 233); JA-136. After reviewing the text and structure of the statute and applicable case law, the appellate court "conclude[d] that neither § 152, First nor § 152, Seventh [of the RLA] provides a private cause of action to individual employees . . . under the circumstances presented here," Pet., p. 16a, and that "the appropriate remedy for injuries of the sort plaintiffs allege is a claim against their union for breach of the [DFR]," Pet., p. 9a; Pet. pp. 6a-16a—a claim which, as noted, the court determined, and plaintiffs no longer dispute, plaintiffs could not establish.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE RULING BELOW THAT THE ISSUES PRESENTED IN PLAINTIFFS' CLAIMS ARE TO BE DETERMINED EXCLUSIVELY BY FEDERAL LABOR LAW IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS

A. Plaintiffs claim that the RPA—a CBA between parties (APFA and American) regulated by a federal statute (the RLA)—was unlawfully negotiated and ratified and the pre-concessionary 2001 CBA should be restored. *See* JA-136 (prayer for relief). This assertion directly implicates APFA's collective bargaining relationship with American and its representational conduct, both of which are at the core of federal labor policy and governed exclusively by the DFR. Pet., pp. 9a, 22a-24a; *Vaca v. Sipes*, 386 U.S. 171, 174, 177 (1967); *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). Accordingly, plaintiffs' attempt to vacate the RPA by challenging the Union's representational actions could only succeed through a showing that APFA breached its DFR and American was a party to that breach.[6] As both lower courts found, however, there was no evidentiary or legal basis for plaintiffs' five DFR claims and plaintiffs do not seek review of this conclusion.

Plaintiffs have now abandoned all their federal claims against APFA (they did not appeal from dismissal of their LMRDA and RICO claims) that were the focus of their lawsuit (nine of their ten claims

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[6] *See Humphrey v. Moore*, 375 U.S. 353, 373 (1964) (Goldberg, J. concurring).

against APFA were federal claims), and instead, before this Court, have placed exclusive attention on a parallel state law claim for breach of the APFA Constitution that, as plaintiffs acknowledge, is predicated on "the same nucleus of operative fact[s]" as their dismissed DFR claims. Pet., p. 29 n.21; Pet., pp. 22a-23a; Pet., p. 90a (district court stating same); *see* JA-84-85; JA-87-95. Because subjecting federally regulated labor law conduct to varying "state liability" standards would undermine the need for uniformity that underpins the "federal [labor law] scheme," the Second Circuit "easily conclude[d]" that this state law claim (and related state causes of action against American) are preempted by federal labor law. Pet., pp. 22a-24a. In so holding, the Second Circuit followed decisions of this Court that have been consistently applied by the lower courts.

B. A key tenet of federal labor law, under both the RLA and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*, is the need for uniformity in the regulation of union and employer collective bargaining conduct. *See, e.g., IAM v. Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963) (adding that state regulation of areas governed by RLA would impede RLA goal of minimizing interruption to nationwide transportation and resolving labor disputes peacefully).[7] As this Court emphasized in *Jacksonville*

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[7] *Accord Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 320-23 (3rd Cir. 2004) (RLA); *see also* Pet., p. 108a (district court decision; RLA governs the process of negotiation of CBAs). NLRA cases stressing the need for uniformity include *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1974), *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286-87 (1986), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208-13 (1985). *See Lodge 76, IAM v. Wisconsin Employment Relation Comm'n*, 427 U.S. 132, 140 & n.4 (1976)

Terminal, "the imposition of inconsistent state obligations" on union and employer conduct regulated by federal labor law would disrupt the "uniform[]" federal labor law scheme and would be "fatal to the goals of the [RLA]." 394 U.S. at 381; *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203 (5th Cir. 2001) (cited at Pet., p. 33) (federal labor preemption serves to preserve federal labor law "uniformity"); *Cooper v. TWA Airlines, LLC*, 349 F.Supp.2d 495, 505, 507 (E.D.N.Y. 2004). For similar reasons, it is federal labor law, not state law, that provides the standard for determining whether a "contract [under the RLA] is valid and enforceable according to its terms." *Central Airlines*, 372 U.S. at 691; *accord Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956) ("A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of federal law upon it and . . . could not be made illegal nor vitiated by any provision of the laws of a State").

The DFR fits within and forms an essential part of this federal labor law scheme, prescribing the uniform obligations and standards for the union's performance of "all" representational conduct, *O'Neill*, 499 U.S. at 67, 77; *see also Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 202-03 (1942), including with regard to the negotiation and ratification of CBAs,[8] *contra* Pet., p. 32,

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(cited at Pet., p. 26 n.18) (federal law governs collective bargaining conduct).

[8] *Accord Vaca*, 386 U.S. at 181 (DFR applies to negotiation of CBA); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979) (same); *Commc'n Workers v. Beck*, 487 U.S. 735, 743 (1988) (same); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-21 (11th Cir. 1988) (DFR applies to union's negotiation of concessionary agreement and its conduct during CBA's ratification); *Acri v. IAM*, 781 F.2d 1393, 1397 (9th Cir. 1986) (DFR applied to union ratification conduct); *Anderson v. United Paperworkers Int'l*

and in applying related internal union constitutional provisions or policies.[9] The DFR is "federal law . . . grounded in federal statutes," and is governed by "federal standards," *Vaca*, 386 U.S. at 174, 177; *accord Humphrey*, 375 U.S. at 341, 343-44, that are identical under the RLA and NLRA, *O'Neill*, 499 U.S. at 76; *Vaca*, 386 U.S. at 182-83; *Steele*, 323 U.S. at 202-03.

The application of uniform federal labor law standards to union conduct is reflected in: (a) the broad deference accorded to unions when reviewing their representational conduct, *e.g.*, *O'Neill*, 499 U.S. at 67, and their interpretations of their constitutions, *Sim*, 166 F.3d at 469-70; *James*, 302 F.3d at 1145-46,

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Union, 641 F.2d 574, 578-79 (8th Cir. 1981) (same); *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977) (RLA case that, *contra* Pet., p. 32, explicitly holds that the DFR "extend[s] to union conduct in contract ratification voting"); *see James v. Int'l Bhd. of Locomotive Eng'rs*, 302 F.3d 1139, 1146, 1150 (10th Cir. 2002); *Sim v. New York Mailers' Union Number 6*, 166 F.3d 465, 468, 472 (2d Cir. 1999) (pertaining to re-ballot on previously rejected CBA); *Davenport v. IBT*, 166 F.3d 356, 361-62 (D.C. Cir. 1999); *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1387-88 (6th Cir. 1994); *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-03 (5th Cir. 1991) (following remand); *Baker v. Newspaper and Graphic Commc'ns Union, Local 6*, 628 F.2d 156, 166-67 (D.C. Cir. 1980); *Ryan v. New York Newspaper Printing Pressman's Union No. 2*, 590 F.2d 451, 456 (2d Cir. 1979). Plaintiffs' inexplicable citation to *White v. White Rose Foods*, 237 F.3d 174, 182 (2d Cir. 2001), Pet., p. 32, is not to the contrary.

[9] *James*, 302 F.3d at 1146; *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992); *Baker*, 628 F.2d at 166-67; *Leber v. Universal Music and Video Distrib., Inc.*, 225 F.Supp.2d 928, 948 (S.D. Ill. 2002); *see Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170 (4th Cir. 1985); *Bates v. Bhd. of Locomotive Firemen and Enginemen*, 56 L.R.R.M. (BNA) 2274 (M.D. Fla. 1964).

1150; *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990); *O'Neill*, 939 F.2d at 1201-03, 1205-06; *Jones v. Pepsi Cola Bottling Co.*, 822 F.Supp. 396, 403 (E.D. Mich. 1993), (b) the application of a uniform six-month statute of limitations for DFR claims, *DelCostello v. IBT*, 462 U.S. 151, 171-72 (1983), and (c) the limitations on the type and extent of damages available for DFR breaches, *Foust*, 442 U.S. at 47-53; *Vaca*, 386 U.S. at 195-98. Given this focus on federal labor law uniformity, the application of state law standards to union representational conduct "cannot be sustained," *Vaca*, 386 U.S. at 192-93; *accord Humphrey*, 375 U.S. at 341, 343-44 (DFR is "controlled by federal law," not state law); *see also infra* p. 21 n.13 (citing additional appellate and district court decisions). Allowing individuals to challenge a CBA's validity only upon a showing that their union breached its DFR in exercising its exclusive statutory authority maintains the uniformity of federal labor law and the RLA's detailed collective bargaining framework, *Jacksonville Terminal*, 394 U.S. at 378, and does not "superhybridize[]" or otherwise improperly limit employees' access to judicial redress, *contra* Pet., p. 22. *Infra* pp. 23-24 n.16.

The determination below that plaintiffs' state law claims are preempted rests squarely on this Court's governing case law. The lower court concluded, as did this Court in *Jacksonville Terminal*, that preemption was essential because the "'potentials for conflict, and for the imposition of inconsistent state obligations, are simply too great' to allow each State to regulate conduct central to Congress' RLA goals," Pet., p. 22a (quoting *Jacksonville Terminal*, 394 U.S. at 381). Its determination that "the imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the 'balance

of power' established by the RLA, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 . . . (1986), and 'frustrate effective implementation of the [Act's] processes,'" Pet., pp. 22a-23a (quoting *Jacksonville Terminal*, 394 U.S. at 380), again was drawn directly from this Court's teachings. So, too, was its conclusion that, given the core labor law issues at stake, the standard for judging the parties' conduct herein "'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme,'" and that "'[t]he needs of the subject matter manifestly call for uniformity.'" Pet., p. 22a (quoting *Central Airlines*, 372 U.S. at 691-92). These determinations, which provide the basis for the Second Circuit's preemption ruling, were faithful to this Court's labor law guidance; they struck no new ground. *See also* Pet., p. 110a (district court stating that preemption under RLA and NLRA "is driven by the need for uniform federal regulation of labor-management relations").[10]

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[10] Section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh, *contra* Pet., p. 35, is irrelevant to the preemption at issue here. In 1947, Congress amended the NLRA by, *inter alia*, adding Section 14(b), 29 U.S.C. § 164(b), to provide that state right-to-work laws were not preempted by the NLRA's allowance of union security clauses under Section 8(a)(3), 29 U.S.C. § 158(a)(3). When four years later Congress added Section 2, Eleventh to the RLA to permit union security clauses, *Beck*, 487 U.S. at 746, it made clear that, in contrast to the NLRA, RLA Section 2, Eleventh *would* preempt state right-to-work laws. *See Hanson*, 351 U.S. at 231, 232 & n.5; *Price v. UAW*, 927 F.2d 88, 92 (2d Cir. 1991). Congress neither stated nor suggested this meant RLA preemption would be limited to this narrow context; indeed, the contemporaneous debate reflects Congressional recognition that the RLA "has for a long time preempted the field." 81 Cong. Rec. 16371-78 (1950), *reprinted in* THE

C. The court below relied on this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in precisely the same way that this Court did in another RLA case, *Jacksonville Terminal*: "for assistance" in "delineating" the type of union or carrier conduct that is governed by the federal labor law and therefore "protected against infringement by the States," in contrast to other situations where state regulatory interest is "compelling" (*e.g.*, union violence) or that is of peripheral concern to federal labor law. *Jacksonville Terminal*, 394 U.S. at 381-86 & n.19, 391 (quoting *Garmon*, 359 U.S. at 247, and citing to other NLRA cases); *accord* Pet., pp. 17a-19a (same, quoting *Garmon*, 359 U.S. at 241, 243, 244 & n.3, 246, 247). As this Court emphasized, *Garmon's* focus on the need to protect uniform federal labor law standards from state regulatory intrusion is just as applicable under the RLA as it is under the NLRA—notwithstanding that there is no RLA agency counterpart to the National Labor Relations Board ("NLRB"), *Jacksonville Terminal*, 394 U.S. at 384 n.19; Pet., p. 19a; *contra* Pet., pp. 25-27, 34-35—and therefore it is essential that union and carrier conduct pertaining to the formation of a CBA be governed exclusively by federal law, free of state regulation. 394 U.S. at 381. *Accord* Pet., pp. 22a-23a;[11] *Nellis v. Air Line Pilots Ass'n*, 805 F.Supp. 355, 360 n.5 (E.D. Va. 1992); *see Peterson*, 759 F.2d at 1168-69.

RAILWAY LABOR ACT OF 1926, A LEGISLATIVE HISTORY 1222 (Michael H. Campbell & Edward C. Brewer, III, eds., William S. Hein & Co.) (1988); *accord id.* at 16320-33 (statement of Sen. Thomas), *reprinted in* THE RAILWAY LABOR ACT OF 1926, A LEGISLATIVE HISTORY 1188.

[11] As the court below correctly noted, courts have applied the reasoning of *Jacksonville Terminal* and *Garmon* in a variety of RLA contexts. Pet., pp. 19a-23a; *see also* Pet., p. 110a.

The court below thus correctly concluded that underlying "the principles animating *Garmon, Jacksonville Terminal*, and their progeny" is a "concern with whether the particular state law at issue may 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" Pet., pp. 20a-21a (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), and that application of these principles required preemption of plaintiffs' state law claims.[12]

D. There is no inter-circuit conflict regarding the scope and effect of RLA and DFR preemption, *contra* Pet., pp. 33-34. Plaintiffs cite no case that permits prosecution of a state law claim that is premised on the same allegations as a DFR claim and challenges conduct that is governed by the DFR. To the contrary, the determination below that preemption is required where, as here, the state law claim rests on the same factual allegations as the DFR claims, Pet., pp. 22a-23a (Second Circuit), 90a (district court), is in

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[12] *Contra* Pet., p. 31 n.22, cases therein cited reflect that *Garmon* preemption is predicated on the need to safeguard uniform federal labor law standards and the "danger of state interference with [this] national policy." *E.I. DuPont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 792 (5th Cir. 2008); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 661 (7th Cir. 1992) (preemption analysis considers "risk that the state will approve conduct that the NLRA prohibits"); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1287-88 (6th Cir. 1986) (state interest "properly overridden by the need to enforce a uniform federal labor law"); *United Credit Bureau v. N.L.R.B.*, 643 F.2d 1017, 1026 (4th Cir. 1981) ("paramount traditional consideration underlying the labor preemption doctrine [is] the danger of potential conflict between the state court and the Board specifically, . . . the 'danger of interference with federally protected conduct'") (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202-03 (1978)).

line with a long series of decisions, *e.g.*, *Nellis*, 805 F.Supp. at 360 (preemption required where state claim is a "mere refinement" of a DFR claim), *aff'd*, 15 F.3d 50 (4th Cir. 1994),[13] and in conflict with none.

The cases plaintiffs cite to suggest "disarray" among the circuits have nothing to do with union and employer conduct in the formation of a CBA that is at the heart of the present case. *See* JA-136 (prayer for relief). Because this case is about CBA formation, not

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[13] *Accord Cooper*, 349 F.Supp.2d at 508 (claim preempted if "based on the same conduct that would support" DFR claim); *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 322 (DFR is an area "dominated by the sweep of federal statutes" and thus union representational conduct is "governed by federal law . . . rather than by local law"), *aff'g in part and rev'g in part on other grounds*, 271 F.Supp.2d 616, 629 (D.N.J. 2003); *May v. Shuttle*, 129 F.3d 165, 179 (D.C. Cir. 1997) (state law fraud claim "same as" DFR claim preempted); *Dunn v. Air Line Pilots Ass'n*, 836 F.Supp. 1574, 1580, 1584 (S.D. Fla. 1993) (claim that union disregarded its internal policy was "nothing more" than assertion of arbitrary and bad faith conduct that "clearly falls within the [DFR]" and is "preempted" and "governed exclusively by federal law"); *Griffin v. Air Line Pilots Ass'n, Int'l*, No. 93-C-719, 1993 WL 348568, *7-8 (N.D. Ill. Sept. 3, 1993) (state tort claim "based on the identical conduct underlying [DFR] claim" preempted due to "unacceptable threat of disruption to the scheme of federal labor relations" that could result from "conflicting standards"), *aff'd*, 32 F.3d 1079, 1084-85 n.2 (7th Cir. 1994); *Johnson v. UFCW, Local No. 23*, 828 F.2d 961, 967 (3d Cir. 1987); *Peterson*, 759 F.2d at 1169-71 (preempting state claims having "significant overlap" with DFR claim); *Steele v. Brewery and Soft Drink Workers Local 1162*, 432 F.Supp. 369, 375-76 (N.D. Ind. 1977) (state claim based on same conduct as DFR claim preempted); *see BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers*, 132 F.3d 830, 832 (1st Cir. 1997) (negligence claim challenging union's "representational" conduct preempted by DFR); *James*, 302 F.3d at 1150; *Condon v. Local 2944 United Steelworkers*, 683 F.2d 590, 594-95 (1st Cir. 1982).

interpretation, cases applying the distinct "*Norris/Lingle*"[14] preemption doctrine, Pet., pp. 33-34, that turn upon whether a state law claim requires interpretation of a CBA (a so-called RLA "minor dispute"), are irrelevant. *See also* Pet., pp. 113a-14a (district court noting that plaintiffs "obfuscate[] the difference between federal preemption over [formation of a CBA] under the RLA, which is at issue here, and federal preemption of disputes regarding the interpretation of collectively bargained agreements, which is not at issue"). Similarly irrelevant are decisions cited at Pet., pp. 33-34, holding that local laws prohibiting discriminatory employment practices or setting minimum substantive labor standards are not preempted;[15] these areas have long been recognized as unimpeded by the RLA. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963) (RLA does not preclude local laws prohibiting discriminatory hiring practices); *Terminal R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6-7 (1943) (RLA does not preempt "the field of regulating working conditions themselves").

E. Plaintiffs assert that the court below erred in applying a "potential for conflict" standard rather

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[14] *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

[15] *Air Transport Ass'n v. City and County of San Francisco*, 266 F.3d 1064, 1076-78 (9th Cir. 2001) (local law precluding discrimination in provision of employee benefits by local government contractors). *Wisconsin Cent. v. Shannon*, 539 F.3d 751 (7th Cir. 2008) (Pet., p. 33), in which the court held that a state regulation of rail employee overtime pay was preempted by the Adamson Act of 1916, 49 U.S.C. § 28301, *id.* at 754-55, *contra* Pet., p. 33, also does not support plaintiffs' "circuit disarray" argument.

than requiring an "actual conflict" to find their state claims preempted. Pet., p. 35. Once again, however, plaintiffs fault the Second Circuit for adhering to the decisions of this Court. *See, e.g., Jacksonville Terminal*, 394 U.S. at 381 (preemption required because the "potentials for conflict [were] . . . simply too great to allow each State . . . to decide for itself" what law applies to an RLA dispute, quoted in part in Pet., p. 23a); *Vaca*, 386 U.S. at 178-79 ("potentially conflicting" state laws "cannot be permitted to operate" where the DFR governs); *Garmon*, 359 U.S. at 249-50; *see also Peterson*, 759 F.2d at 1169-70; *Condon*, 683 F.2d at 594-95.

In any event, as the court below correctly found, *contra*, Pet., p. 35, and as the Petition itself makes clear, the conflict here between state and federal law is not only potential but real. Pet., p. 23a. Plaintiffs offer as a reason against preemption that the exacting DFR standard, *e.g., O'Neill*, 499 U.S. at 76-78, is "virtually impossible to meet," Pet., p. 24. If true, that only serves to demonstrate precisely why preemption is necessary here and why the decision below is fully consistent with established case law. Plaintiffs are unable to succeed not because of preemption, but because, as the courts below found, there was no evidence to support the five DFR claims that plaintiffs asserted against both defendants. Pet., pp. 24a-29a, 89a-90a; *see* JA-87-94 (¶¶ 241, 257, 267, 277, 291).[16] To permit plaintiffs, nevertheless, to

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[16] In appropriate cases, and *contra* Pet., pp. 22-23, 34-35, claims can be pursued and relief ordered against both a union and an employer for a DFR breach. *See, e.g., Davenport*, 166 F.3d at 361-62; *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985); *Jones v. Trans World Airlines*, 495 F.2d 790, 798 (2d Cir. 1974); *see generally Vaca*, 386 U.S. at 196-97 & n.17; Pet., p. 14a (Second Circuit

apply a less demanding state law standard and obligations to this same evidence would be to sanction precisely what the carefully constructed DFR preemption doctrine is intended to avoid—the elimination of "the rationality and symmetry the Supreme Court has finally brought to the [DFR] law," *Peterson v. Kennedy*, 771 F.2d 1244, 1259 (9th Cir. 1985); *see also Jacksonville Terminal*, 394 U.S. at 378-81 (uniform federal labor law scheme "would become meaningless" if state law could apply and present potential conflict); *Lockridge*, 403 U.S. at 285-86 (federal labor law preemption is needed "to avoid conflicting regulation" of unions and employers); *supra* pp. 14-18.

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In sum, there is no divergence between the decision below and the labor law preemption decisions of this Court or other circuits that warrants Supreme Court review.

II. THE DETERMINATION BELOW THAT PLAINTIFFS HEREIN HAVE NO PRIVATE RIGHT OF ACTION UNDER SECTION 2, FIRST AND 2, SEVENTH OF THE RLA CREATES NO CONFLICT WARRANTING REVIEW

There also is no conflict among the circuits or other extraordinary reason to review the dismissal of plaintiffs' claims under RLA Section 2, First and Seventh, 45 U.S.C. § 152, First and Seventh.

A. Section 2, First addresses the obligation of carriers and unions to make every reasonable effort to

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rejecting argument that DFR preemption left plaintiffs without a remedy).

make and maintain agreements. Section 2, Seventh prohibits unilateral changes by carriers in terms and conditions embodied in CBAs prior to exhaustion of the RLA's bargaining procedures. Fundamental principles of federal labor law and the text and structure of the RLA, as the Second Circuit correctly concluded, preclude an individual employee right of action under Section 2, First or Seventh where, as here, the employees are represented by a union and the claims are directed at the collective bargaining conduct of the union and the employer. Pet., pp. 9a-16a.

Under the RLA (as under the NLRA), once employees are represented by a union, their individual interests necessarily are "subordinate[d]" to the "collective interests of all employees in [the] bargaining unit," *Vaca*, 386 U.S. at 182, and it is the union, alone, and not individual employees, that can negotiate and conclude CBAs. *Steele*, 323 U.S. at 202 (under RLA); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347 (1944) (under RLA); *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 339 (1944) (under NLRA); Pet. pp. 11a-12a (citing *Steele*).[17] Here, APFA exercised this authority by negotiating, through the RPA, changes to the existing 2001 CBA.

The purpose of the RLA status quo requirements is to encourage peaceable settlement of labor controversies and prohibit *unilateral* conduct that could

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[17] *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), concerned, unlike here, a so-called RLA "minor dispute" (pertaining to a dispute over the meaning of CBA provisions). It lends no support to plaintiffs, *contra* Pet., pp. 16-17. To the contrary its statement that the RLA "vests *exclusive* authority to negotiate and to conclude agreements . . . in the duly selected [union]," 325 U.S. at 722-24, 728 (emphasis added), is fully consistent with the decision below.

disrupt interstate travel (*e.g.*, a strike or a carrier's unilateral alteration of terms and conditions of employment that could provoke a strike) prior to exhaustion of the RLA's statutory bargaining processes. *Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148-53 (1969); *Jacksonville Terminal*, 394 U.S. at 378; 45 U.S.C. § 152, First (status quo obligation imposed "in order to avoid any interruption to commerce or to the operation of any carrier"); *see Virginian Ry. Co. v. Sys. Fed'n, No. 40*, 300 U.S. 515, 548 (1937) (RLA "aimed at securing settlement of labor disputes"); *Texas & N. O. R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (RLA intended to protect interstate commerce from disruptions caused by labor disputes). The entry of APFA and American into the RPA furthered these objectives. Because American did not unilaterally alter the existing contractual terms, there was no status quo violation. The fact that these negotiated changes of the RPA were accomplished during the term of an existing CBA is of no import; the RLA "explicitly allows the parties to alter the status quo *by agreement*." *Air Line Pilots Ass'n, Int'l v. Pan Am World Airways, Inc.*, 765 F.2d 377, 381 (2d Cir. 1985) (emphasis in original); *accord Hendricks v. Air Line Pilots Ass'n, Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) (*quoting Watson v. IBT*, 399 F.2d 875, 879 (5th Cir. 1968)); American Bar Ass'n, THE RAILWAY LABOR ACT 323 (Michael E. Abram, *et al.*, eds., 2d ed. 2005).

If, as was not the case, American had unilaterally altered the terms and conditions of employment, it would be APFA, the other party to the bargaining relationship, that would be authorized to sue to enforce American's RLA status quo obligations. *See Chicago and N.W. Ry. Co. v. United Transp. Union*,

402 U.S. 570, 575-79 (1971) (Congress intended Section 2, First to be "enforceable" by carriers and unions); *see also* cases referenced *infra* pp. 28-29 n.22 (citing cases where a union or carrier sued to enforce status quo obligations). This follows from the Union's status as exclusive bargaining representative, not, *contra* Pet., pp. 15-18, 20-22, because of the "associational standing" doctrine.[18]

As the Second Circuit correctly observed, permitting disgruntled employees to invoke the RLA status quo provisions to challenge the product of collective bargaining—here, a CBA reached by APFA and American, and ratified by the employees—"would risk the very disruption in commerce that the RLA seeks to avoid," Pet., p. 14a, and be "[in]consistent with the underlying purposes of the [RLA's] legislative scheme": to promote labor peace, *Cort v. Ash*, 422 U.S. 66, 78 (1975); Pet., pp. 12a-14a; *accord Bensel*, 387 F.3d at 319 (allowing individual employees to challenge CBAs "would undermine the [RLA's purpose] of providing for an organized process of negotiation between one employee representative and the employer, and could lead to chaos").[19]

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[18] Plaintiffs assert some impropriety in having the potential claims of retirees within their purported class left to APFA to pursue, Pet., pp. 20-22, but that has no applicability here. The RPA made no changes to the flight attendants' retirement plan and did not affect any allegedly accrued retiree entitlements. JA-435; JA-1335-36; JA-3526; JA-3625-26; *see* Pet., p. 46a; JA-3680. Furloughed flight attendants are covered by the CBA and thus represented by APFA; *contra* Pet., p. 20, they are not "former employees."

[19] *Contra*, Pet., p. 19, the Second Circuit concluded that plaintiffs lack standing to pursue their RLA claims against American based on the wording, structure and purposes of the RLA, Pet., pp. 9a-10a, 16a, not on any notion that a union "inherently lim-

B. Contrary to Pet., pp. 12-13, no court decision, including those cited by plaintiffs, conflicts with the standing determination of the Second Circuit. *See Bensel*, 387 F.3d at 317-19 and n.4 (finding no cases supporting an implied right in individual employees to pursue claims under Sections 2, First, Second and Ninth of the RLA). The decisions cited by plaintiffs are addressed to entirely distinct and readily distinguishable matters: (1) claims under RLA Section 2, Third and Fourth, 45 U.S.C. § 152, Third and Fourth,[20] which (unlike Section 2, First and Seventh) are intended to safeguard individual employees' rights to join and support a union, *see* Pet., pp. 10a-11a (Second Circuit distinguishing Section 2, First from Section 2, Third and Fourth "for which [individual employee] private rights of action have been recognized"); *Bensel*, 387 F.3d at 318 (same); (2) RLA minor disputes,[21] which, as noted, *supra* pp. 21-22, are unrelated to the issues here; (3) claims brought by the union or carrier, not by individual employees;[22]

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its . . . its members' right to sue," Pet., p. 19. APFA placed no limitations on plaintiffs' right to sue and Section 101(a)(4) of the LMRDA (which prohibits labor organizations from "limit[ing] the right of any member thereof to institute" a lawsuit, 29 U.S.C. § 411(a)(4)) has no applicability here.

[20] Pet., pp. 12-13: *Lebow v. Am. Trans. Air Inc.*, 86 F.3d 661 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983); *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970); *see also Texas & N. O. R.*, 281 U.S. 548 (RLA § 152, Third judicially enforceable by union).

[21] Pet., pp. 13-14 and n.7: *Kushto v. Bhd. of Ry. Airline & S.S. Clerks*, 818 F.2d 290 (4th Cir. 1987); *Kaschak v. Consol. Rail Corp.*, 707 F.2d 902, 908, 910 (6th Cir. 1983); *Hilbert v. Pennsylvania R.R. Co.*, 290 F.2d 881, 885 (7th Cir. 1961).

[22] Pet., pp. 12-14 and n.6: *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989) (suit by union); *Chicago &*

or (4) claims which, unlike those presented here, challenge conduct of unions that were not the plaintiffs' exclusive representative and thus which did not implicate the DFR.[23] The Second Circuit's

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N.W. Ry. Co., 402 U.S. 570 (employer suit against union to enjoin strike); *Detroit & Toledo Shore Line R.R. Co.*, 396 U.S. 142 (same; union counterclaimed); *Order of R.R. Telegraphers v. Chicago. & N. W. Ry. Co.*, 362 U.S. 330 (1960) (employer suit against union to enjoin strike); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946) (suit by union that required CBA interpretation; referred to Adjustment Board); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944) (suit by union); *Virginian Ry. Co.*, 300 U.S. 515 (suit by union under Section 2, Ninth); *IAM v. Transportes Aereos Mercantiles Pan Americanados, S.A.*, 924 F.2d 1005 (11th Cir. 1991) (suit by union); *United Transport. Union, Local 63E v. Penn Cent. Co.*, 443 F.2d 131 (6th Cir. 1971) (same); *Southern Ry. Co. v. Bhd. of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967) (same); *United Indus. Workers v. Bd. of Trs. of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (same); *Railroad Yardmasters v. Pennsylvania R.R. Co.*, 224 F.2d 226, 227 (3d Cir. 1955) (same); *see Regional Airline Pilots Ass'n, Inc. v. Wings West Airlines, Inc.*, 915 F.2d 1399 (9th Cir. 1990) (same; also including Section 2, Third and Fourth claims that individuals may appropriately assert, *supra* p. 28); *Carbone v. Meserve*, 645 F.2d 96, 98, 100 (1st Cir. 1981) (suit by union; dispute concerning an alleged CBA breach, as in the cases noted *supra* n.21, and not "relate[d] to the formation or modification of the [CBA]"). In *Mungin v. Florida East Coast Ry. Co.*, 416 F.2d 1169 (5th Cir. 1969) (Pet., p. 14), employees challenged the carrier's refusal to reinstate them pursuant to a status quo injunction obtained by the government after their union, acting without authority and in breach of "its duty of faithful representation" (unlike the situation here), agreed that the carrier need not reinstate them. *Id.* at 1172-74, 1178.

[23] Pet., p. 14: *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958) (union that was not the employees' representative sought employee's discharge through enforcement of its union shop agreement); *Dwellingham v. Thompson*, 91 F.Supp. 787 (E.D. Mo. 1950) (dispute resolution between carrier and

conclusion that plaintiffs cannot challenge the product of collective bargaining negotiations by directly suing their employer where, as here, their bargaining representative fulfilled its DFR in entering the challenged CBA is consistent with all other authorities and the wording and structure of the RLA and there is no reason to review it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 28, 2010

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union that was not the employees' bargaining representative resulted in displacement of the employees), *aff'd sub nom., Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952).

SUPREME COURT, U.S.
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MAY 26 2010

No. 09-1310

IN THE

Supreme Court of the United States

JILL LINDSAY, *et al.*,
Petitioners,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Can a dissatisfied group of represented airline employees who wish to invalidate a collective bargaining agreement negotiated by their certified Railway Labor Act bargaining representative state a cause of action that the employer's implementation of the agreement breached the status quo under Sections 2 First and 2 Seventh of the Railway Labor Act?

2. Can a group of employees who are represented by a union under the federal Railway Labor Act pursue state law claims for breach of a union constitution against their certified bargaining representative and their employer based on the bargaining representative's collective bargaining conduct subject to the duty of fair representation under the Railway Labor Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent American Airlines, Inc. hereby avers that AMR Corporation is the parent corporation of American Airlines, Inc.

Respondent AMR Corporation is a publicly held corporation. FMR, LLC and PrimeCap Management Company each own more than 10% of AMR Corporation's stock.

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IN THE

Supreme Court of the United States

No. 09-1310

JILL LINDSAY, *et al.*,
Petitioners,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS AMR CORPORATION AND AMERICAN AIRLINES, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Background

The Petitioners are a group of flight attendants who are seeking to invalidate a collective bargaining agreement negotiated in April 2003 between their exclusive bargaining representative, the Association of Professional Flight Attendants ("APFA"), and their employer, American Airlines, Inc. ("American"). The 2003 collective bargaining agreement at issue, known

as the Restructuring Participation Agreement ("RPA") enabled American to avoid joining the other major carriers that had filed for bankruptcy in the economic wake of the events of September 11, 2001.

B. Industry Turmoil And The Threat Of Bankruptcy

American is one of the world's largest passenger airlines, providing scheduled jet service to destinations throughout North America, the Caribbean, Latin America, Europe, and the Pacific. Ct. Appeals Joint Appendix "JA" 2500; JA-2807 ¶ 4. AMR Corporation ("AMR") is the publicly-traded parent company of American. JA-2500.[1] American is a "carrier" subject to the Railway Labor Act 45 U.S.C. §§ 151, *et seq.* ("RLA"). JA 50 ¶ 38; JA-205 ¶ 38. The APFA is the union that is certified by the National Mediation Board as the exclusive collective bargaining representative of the craft or class of all American flight attendants under the RLA. JA-51 ¶ 42; JA-205 ¶ 42.

The downturn in the United States economy in 2001, which adversely affected the demand for business travel domestically and internationally, combined with the tragic events of September 11, 2001 to worsen American's financial condition. *See Marcoux v. Am. Airlines*, 645 F. Supp. 2d 68, 71-72 (E.D.N.Y. 2008); JA-2817-2820; JA-2903-2905; JA-2658.

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[1] AMR cannot be sued under the RLA because it is not directly involved in the provision of air transportation services and is not a "carrier" as defined under the RLA. JA-2808 at ¶ 4. *See also Signature Flight Support*, 34 N.M.B. 1, 2 (2006) (explaining that AMR is a "holding company"); *Flagship Airlines, Inc.*, 22 N.M.B. 331, 353-55 (1995) (describing AMR as American's parent Company without reference to AMR's own status as a "carrier").

On August 13, 2002, in an effort to correct its deteriorating financial condition, American's management announced a series of initiatives to reduce its costs by at least $4 billion. JA-2819; JA-2905. As part of this effort, American sought $1.8 billion in savings from renegotiation of its collective bargaining agreements and savings from its officers, managers and unrepresented employees. *Marcoux*, 645 F. Supp. 2d at 72; JA-3716; JA-3942 at 22:11-25. The alternative was almost certain bankruptcy.

C. Negotiations With The APFA

In February 2003, American made a formal request to the three unions (APFA, the Allied Pilots Association ("APA") and the Transport Workers Union, AFL-CIO ("TWU")) that represent American's employees to negotiate and restructure their collective bargaining agreements. *Marcoux*, 645 F. Supp. 2d at 72-73; JA-3942 at 22:10-13; *see also* JA-3268-3270. American requested that the unions collectively agree to reduce annual labor costs by $1.6 billion, $340 million of which was sought from the APFA as the representative of American's flight attendants. JA-3942 at 22:11-23:25.

The APFA's Board of Directors convened in February 2003 to consider American's request for concessions. It received presentations about American's dire financial condition and resolved that the APFA would negotiate with American because the Board "[understood] that the best interests of the membership will be served by taking all appropriate action to expeditiously address [American's] financial situation" to ensure that American continued as a viable and successful entity. *Marcoux*, 645 F. Supp. 2d at 73-74; JA-1333.

American and the APFA engaged in intense negotiations against a March 31, 2003 deadline set by American for achieving tentative agreements in order to avoid a bankruptcy filing. *Marcoux,* 645 F. Supp. 2d at 74-75; JA-3847 at 46:17-22; JA-1130 at 151:10-23; JA-1165 at 290:20-291:7; JA-3944 at 30:7-31:19; JA-3948 at 51:15-52:10; JA-3972 at 200:17-21.

D. The RPA And The Ratification Process

American and the APFA tentatively agreed to the RPA on March 31, 2003. *Marcoux,* 645 F. Supp. 2d at 76; JA-3400-3410; JA-3955 at 102:8-103:11. (The TWU and APA also reached agreements in a timely fashion. JA-1154-1166 at 290:20-291:7; JA-3944 at 30:7-31:19; JA-3948 at 51:15-52:10; JA-3972 at 200:17-21). American set a deadline of April 15, 2003 for member ratification of all of its restructuring labor agreements. JA-3696 at 25:20-26:11. This deadline was set out of concern that American's financial condition would continue to deteriorate and cause liquidation of the company and additional job losses. JA-3698 at 27:5-12. To meet the April 15, 2003 deadline, the APFA decided to utilize expedited, electronic balloting procedures for the ratification vote. *Marcoux,* 645 F. Supp. 2d at 77; JA-1465.

On the morning of April 15, 2003, management representatives met with representatives of all three unions at American's headquarters to discuss the status of the restructuring agreements. JA-3960 at 137:6-13. APFA representatives had previously requested that American extend the deadline for ratification. *Marcoux,* 645 F. Supp. 2d at 79-80. The APA also asked for an extension of a few hours and TWU had already ratified its RPA. JA-3961 at 139:17-140:2. Based on concerns that flight attendants had not been able to change their votes during

the ratification process, both APA and TWU supported a possible extension of the APFA voting period. *Marcoux,* 645 F. Supp. 2d at 80; JA-3960 at 137:4-17. In response, American's CEO, Don Carty, offered to delay the bankruptcy filing by one day, until April 16, 2003, in order to allow the APFA to extend its voting period. *Marcoux,* 645 F. Supp. 2d at 80; JA-3707 at 37:5-38:1; JA-3706 at 40:7-25; JA-3724 at 90:19-23; JA-3726 at 92:12-18, JA-3740 at 135:10-24. The APFA's Board of Directors accepted American's offer of a one-day extension. *Marcoux,* 645 F. Supp. 2d at 80; JA-1609. APFA informed its membership about the vote extension and the opportunity for flight attendants to change their votes. *Marcoux,* 645 F. Supp. 2d at 81; JA-3397 at 120:2-19; JA-1461.

The final vote count on April 16, 2003 was 10,761 "Yes" votes and 9,652 "No" votes. *Marcoux,* 645 F. Supp. 2d at 81; JA-1468; JA-622 at 195:19-196:21; JA-1252 at 94:7-24. On April 16, 2003, APFA informed American that the RPA had been ratified by the membership. JA-3969 at 180:24-181:17. Both American's management and APFA's leadership recognized that a new, ratified collective bargaining agreement was in place on April 16, 2003. JA-3689 at 342:16-343:22; JA-1123 at 122:14-123:7, 512:3-12; JA-3734 at 113:11-18.

E. The Dispute Over Executive Compensation

In 2002, AMR's Board of Directors ("Board") had funded its Senior Executive Retirement Plan ("SERP"), a retirement plan for members of management who earn more than can be covered under American's other defined benefit pension plans, and also signed retention agreements with certain executives. *Marcoux,* 645 F. Supp. 2d at 83; JA-2900; JA-3721 at 83:4-11; JA-3642 at 54:14-55:25. On April 17, 2003,

the Wall Street Journal published an article about American's funding of the SERP and, as a result of this widely-publicized disclosure, the APFA threatened to conduct a new vote on the ratification of the RPA. *Marcoux,* 645 F. Supp. 2d at 84; JA-3467; JA-3970 at 189:19-24; JA-1198 at 421:16-422:9; JA-3730 at 103:11-20; JA-3470; JA-1475. As a result of this controversy, the American executives agreed to cancel their retention agreements and Don Carty resigned as CEO. JA-1202 438:21-25; 439:2-19; JA-3472; JA-3473. American also proposed certain enhancements to the RPA, which did not require any further concessions by APFA. *Marcoux,* 645 F. Supp. 2d at 85; JA-4138. The APFA agreed to these enhancements in order to avoid a bankruptcy filing, and thereby settled all remaining disputes relating to the RPA. JA-3974 at 211:20-22; JA-1481; JA-1537.

On April 25, 2003, American and the APFA agreed to a Letter of Agreement ("LOA") that resolved "all disputes which exist between them related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." *Marcoux,* 645 F. Supp. 2d at 85; JA-4138. The RPA was implemented on May 1, 2003 and governed the terms and conditions of the flight attendants' employment at American. JA-3720 at 74:16-22. As a result of the RPA and the other concessionary agreements negotiated with APA and TWU, American avoided bankruptcy proceedings. JA-3286.

The RPA became amendable on April 30, 2008, and on May 1, 2008 the parties commenced negotiations for a new agreement under the collective bargaining procedures of the Railway Labor Act. JA-3401. Those negotiations are ongoing and are presently being mediated by the National Mediation Board in

accordance with the Railway Labor Act. *See* National Mediation Board Weekly Activity Report December 22, 2008- December 26, 2008, Case No. A-13489, *available at* http://www.nmb.gov/activ-rpts/odarch.html.[2]

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition is filed on behalf of a relatively small, dissatisfied group of flight attendants who opposed a collective bargaining agreement negotiated in 2003 by their certified collective bargaining representative which enabled American Airlines to avoid bankruptcy.

The questions raised in the Petition involve back-door challenges to the 2003 collective bargaining agreement, based on legal theories that have no support in the Railway Labor Act or its applicable precedent. As the United States Court of Appeals for the Second Circuit found, the union's "vested authority is protected by the RLA [which is] a statutory regime that prioritizes continuity and 'majority rule' over the 'complete satisfaction' of all who are represented. *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 180 (1967). The facts of this case demonstrate why individual employee actions under Sec. 152 First would be inconsistent with a statutory scheme embodying these principles." App. 13A.

The Petitioners' Railway Labor Act and state law theories were rejected by the courts below, have no

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[2] The court may take judicial notice of matters of general knowledge and other facts. *See Muller v. Oregon*, 208 U.S. 412, 421 (1908) (stating that the Court "take[s] judicial cognizance of all matters of general knowledge."); *Brown v. Bd. of Ed. of Topeka*, 344 U.S. 1, 3 (1952) (taking judicial notice of a pending case in a different district).

support in other Courts of Appeals, and if adopted would disrupt the representative system of collective bargaining that has led to the successful resolution of labor disputes in the rail and airline industries for more than seventy-five years.

I. THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONERS MAY NOT BRING AN ACTION UNDER THE RAILWAY LABOR ACT TO DIRECTLY CHALLENGE THE COLLECTIVE BARGAINING DECISIONS OF THE UNION THAT REPRESENTS THEM

Petitioners are attempting to assert an individual employee cause of action against their employer, under the status quo provisions of the Railway Labor Act, to invalidate a collective bargaining agreement negotiated by their union.[3] The Second Circuit correctly held that Section 2 First and Seventh, 45 U.S.C. § 152, do not provide such a cause of action for individual employees under the RLA. App. 8a.

As stated in the Second Circuit's opinion, the text of Section 2 First[4] and Seventh[5] of the RLA does not

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[3] As discussed in Section III, infra, Petitioners failed to state a claim against their union representative for breach of the duty of fair representation under the Railway Labor Act and are not challenging that holding directly through this petition. App. 24a-29a. Instead, Petitioners seek to create a new alternative means for challenging indirectly the collective bargaining conduct of their union representative through a statutory cause of action against their employer.

[4] Section 2 First states: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or

reveal any congressional intent to create a right of action for individual employees. App. 9a. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted). In this instance, the statute regulates actions by the carrier in its dealings with the union that represents a craft or class of its employees. The purpose of the provision is to regulate the collective bargaining process.

In concluding that there is no implicit right of action in favor of individual employees under Section 2 First and Seventh, the Second Circuit analyzed the RLA and applied the Court's decision in *Cort v. Ash,* 422 U.S. 66, 78 (1975). App. 9a. There was nothing unusual or controversial about this analysis. The Second Circuit simply considered the *Cort* decision's four factors to reach its determination:

> First, is the plaintiff one of the class for whose special benefit the statute was enacted – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the

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otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First.

[5] Section 2 Seventh states: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152 Seventh.

> plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[6]

App. 9a (quoting *Cort v. Ash,* 422 U.S. at 78).

In determining whether the Petitioners were one of the class for whose special benefit the statute was enacted, the first factor in the *Cort* analysis, the Second Circuit acknowledged that "The statutory requirement in § 152, First that carriers strive to 'maintain agreements concerning rates, rules, and working conditions' may well benefit individual employees." App. 10a. The Second Circuit correctly held that "[t]his is not sufficient, however, to imply a private right of action because the statutory scheme achieves its purpose by collectivizing employees' individual interests." *See* App. 10a (quoting *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. at 180 ("majority-rule concept is today unquestionably at the center of our federal labor policy")).

Evaluating the second *Cort* factor, the Second Circuit then looked to the RLA to determine whether there was any indication of legislative intent, explicit or implicit, either to create or deny an individual employee's right to pursue litigation under Section 2 First. The Second Circuit determined that "Congress clearly intended that individual preferences give way to the collective position embodied by the certified

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[6] *Cort's* fourth criteria for determining whether a statute creates an individual cause of action in not relevant to the Federal question raised by the Petition because the Railway Labor Act's collective bargaining procedures are not a traditional concern of the states.

union representative." App. 11a. Analyzing Section 2 Second[7] and 2 Fourth,[8] the Second Circuit correctly determined that "[t]aken together, these provisions leave no doubt that, where, as here, a 'craft or class of employees' has selected a representative union, Congress intended the power to 'make' and the duty to maintain agreements concerning rates of pay, rules, and working conditions,' *id.* § 152, First, to run between the representative union and the company." App. 11a-12a. This conclusion is well supported by the jurisprudence of federal labor law. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200 (1944); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").

As to the third factor, the Second Circuit looked to the text of Sections 2 First and Seventh of the RLA in determining that it would not be consistent "with the underlying purposes of the legislative scheme" to imply a cause of action for employees under Section 2 First. As the Court has held, the purpose of Section 2 Seventh is twofold: "it operates to give legal and

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[7] Section 2 Second states: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. § 152 Second.

[8] Section 2 Fourth states, in pertinent part: "Employees shall have the right to organize and bargain collectively *through* representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152 Fourth (emphasis added).

binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 156 (1969). When a union has been certified as the representative of a craft or class of employees, negotiating and administering agreements is the *exclusive duty* of the union.[9] This basic tenet of federal labor law was articulated by the Court in *Allis-Chalmers*:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

388 U.S. at 180. Indeed, the principle of exclusive representation by majority rule is firmly entrenched in the RLA. *See* 45 U.S.C. § 152 Fourth ("The *majority of any craft or class of employees* shall have the right to determine who shall be the representa-

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[9] Even assuming *arguendo* individual employees could intervene in the collective bargaining process to assert a status quo claim under Section 2 Seventh, there would be no basis for such a claim in case because American did not act unilaterally in altering the CBA. Rather, American negotiated the RPA with the Petitioners' exclusive bargaining representative, the APFA. The RLA "explicitly allows the parties to alter the status quo by agreement." *Air Line Pilots Ass'n v. Pan Am World Airways*, 765 F.2d 377, 381 (2d Cir. 1985).

tive of the craft or class for the purposes of this Act." (emphasis added)); *Steele*, 323 U.S. at 200 ("The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining"); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548 (1937) (Section 2 Ninth of the RLA creates "the affirmative duty to treat *only* with the true representative, and hence the negative duty to treat with *no other*" (emphasis added)).

In dismissing Petitioners' claims, the Second Circuit correctly held that allowing dissatisfied individual employees to "sue American Airlines under § 152, First to set aside the RPA agreed to by their union representative and ratified by the union membership would risk the very disruption in commerce that the RLA seeks to avoid." App. 14a.

The Second Circuit also noted that Section 2 Seventh may benefit employees, but the second and third *Cort* factors "weigh heavily against recognition of a private right of action by individual employees." App. 15a. Quoting the text of the statute, the Second Circuit determined that Section 2 Seventh "is implicated only where a 'craft or class' of employees has already selected a representative to bargain collectively on its behalf . . . and where an employer attempts to make changes that affect the employees as a class.'" App. 15a; *see also* 45 U.S.C. § 152 Fourth & Seventh. The Second Circuit correctly held that an individual employee's right to bargain with the employer is subsumed by the authority of the certified bargaining representative. This conclusion is again well-supported by the Court's precedent. *See*

Allis-Chalmers, 388 U.S. at 180; *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347 (1944) ("[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.").

The scope of the danger posed to collective bargaining under the RLA by Petitioners' claims is self-evident. The RLA's goal of avoiding interruptions to commerce would be compromised by permitting individual employees to bring statutory claims against a carrier in order to invalidate a collective bargaining agreement negotiated by their union representative. As the Second Circuit correctly noted, Petitioners' dispute is "not with American Airlines . . . but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim." App. 14a. Petitioners' disagreement is with their union and should only be brought as a claim for breach of the duty of fair representation. *See Allis-Chalmers*, 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that the Court found it necessary to fashion the duty of fair representation."). But after exhaustive discovery permitted by the district court, the Petitioners failed to prove that the APFA breached its duty of fair representation. Indeed, the Petitioners have now chosen to abandon their duty of fair representation claims in their Petition.

Petitioners are trying to use statutory claims—and an attempt to be certified as the representative of the class of affected flight attendants—to usurp the role of their Section 2 Ninth representative the APFA,

in negotiating a collective bargaining agreement. App. 2a. If Petitioners were to succeed, the federal labor law principle of majority representation would be upended and the clear purpose of the RLA of facilitating industrial stability through collective bargaining would be subverted. If Petitioners' theory were adopted, it would apply to *every* agreement negotiated by a carrier and a union because every new agreement, by definition, changes the "status quo." And in every negotiation, there are some employees, like the Petitioners, who are unhappy with the agreement reached. Therefore, according to Petitioners' unsupported theory, *every* labor agreement in the airline and railroad industries (the industries that are regulated by the RLA) would be subject to challenge under Sections 2 Seventh and 2 First—and claims for money damages—by individual employees who are unhappy with the agreement. That is not the law, nor should it be the law under the RLA.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON WHETHER SECTION 2 FIRST OR SEVENTH ALLOWS A RIGHT OF ACTION FOR INDIVIDUAL EMPLOYEES

A. The Cases Cited By Petitioners Do Not Support An Individual Employee's Direct Right Of Action

The Second Circuit correctly concluded that there is no judicial support for the proposition that Section 2 First or Section 2 Seventh provides an individual employee cause of action against his or her employer. Petitioners cite a number of cases for the contrary conclusion. None of the cases Petitioners cite apply to Section 2 First or Seventh.

Petitioners cite *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 671 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 926-27 (1st Cir. 1983); and *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1032-1034 (9th Cir. 1970), as support for their assertion that "at least three Circuits have expressly rejected the analysis upon which the Second Circuit" relied in holding that "the only party with standing to sue for violations of the status quo is the union." Petitioner's Brief at 11-12. The cases cited by the Petitioners do not involve collective bargaining claims under Sections 2 First and Seventh, however. Rather, they involve challenges to employee discharges under different sections of the RLA, which focus on the right of individual employees to engage in union organizing activity (*i.e.*, activity that predates the establishment of a collective bargaining representative). *See Lebow,* 86 F.3d at 671 (considering whether a non-union employee could sue for punitive damages under Section 2 Tenth of the RLA in a claim for wrongful discharge); *Stepanischen*, 752 F.2d at 926-27 (applying the *Cort v. Ash* test and holding that Section 2 Fourth of the RLA implies a right of action for an employee who was discharged allegedly because of union organizing activity); and *Burke*, 433 F.2d at 1032-1034 (considering whether an unrepresented employee may bring an action against his employer under Section 2 Fourth of the RLA for reinstatement and damages).

In addition to relying on case law arising under other, inapposite provisions of the RLA, the Petitioners overread the Second Circuit's holding in this case. The Second Circuit did not hold that an individual employee cause of action is *never* available under *any* provision of the RLA. The court only focused on the

collective bargaining and status quo provisions of Section 2 First and 2 Seventh of the RLA.[10] The Second Circuit found that "it would not be consistent 'with the underlying purposes of the legislative scheme' to imply a private cause of action for employees under § 152, First." App. 12a. The Second Circuit further held that Section 2 Seventh does not provide "an implied private right of action by individual employees against an employer." App. 15a. The Second Circuit correctly noted, however, that Section 2 First "is distinguishable from § 152, Third and Fourth, for which individual rights of action have been recognized, in that the latter provisions are specifically aimed at preventing employer interference with individual employees' ability to join a collective bargaining scheme." App. 11a. In addition, the Second Circuit distinguished Section 2 Seventh from Sections 2 Third and Fourth when it noted that Section 2 Seventh "preserves the status quo while the employer and *the union* engage in the negotiation required by 45 U.S.C. §§ 155 and 156." App. 15a (emphasis in original).

Petitioners also cite a number of cases in which they assert that both the Court and other circuits have recognized the existence of an individual employee right of action for violations of the status quo. Petitioners' Brief at 12-13. In each of the cases they cite, however, the cause of action was brought *by the union or by the carrier*, not by individual

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[10] Indeed, the Second Circuit recognized that other circuits have found an individual cause of action under Sections 2 Third and Fourth of the RLA. App. 6a; *see generally Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

employees. [11] The Second Circuit specifically recognized in its decision that "although the RLA does not explicitly provide a private civil cause of action, [the Court] has found such an action by *a union* implicit in the statutory scheme." App. 6a (emphasis in original); *see also Texas & New Orleans R.R. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 555 (1930). The notion that *a union* may bring a private cause of action for violation of the status quo is consistent with the union's duties as the exclusive bargaining representative. But the union's right to bring that cause of action, on behalf of all of the employees it represents, necessarily displaces the right of an individual employee to bring such a cause of action

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[11] *See* Petitioners' Brief at 12-14: *Consol. Rail Corp. v. RLE*, 491 U.S. 299 (1989) (suit by union); *Chicago & Nw. Ry. v. UTU*, 402 U.S. 570 (1971) (employer suit against union to enjoin strike); *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142 (1969) (same); *Order of R.R. Telegraphers v. Chicago. & Nw. Ry.*, 362 U.S. 330 (1960) (employer suit against union to enjoin strike); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946) (suit by union); *Order of Rwy. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944) (suit by union); *Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937) (suit by union under Section 2 Ninth); *IAM v. Transportes Aereos Mercantiles*, 924 F.2d 1005 (11th Cir. 1991) (suit by union); *UTU, Local 63E v. Penn Cent. Co.*, 443 F.2d 131 (6th Cir. 1971) (same); *Southern Ry. v. B.L.F.E.*, 384 F.2d 323 (D.C. Cir. 1967) (same); *United Indus. Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (same); *R.R. Yardmasters. v. Pennsylvania R.R..*, 224 F.2d 226, 227 (3d Cir. 1955) (same); *see Reg'l Airline Pilots v. Wings West Airlines*, 915 F.2d 1399 (9th Cir. 1990) (same); *Carbone v. Meserve*, 645 F.2d 96, 98, 100 (1st Cir. 1981) (suit by union). *Mungin v. Florida E. Coast Ry. Co.*, 416 F.2d 1169 (5th Cir. 1969), involved a group of employees' challenge to employer's refusal to reinstate them pursuant to a status quo injunction obtained by the government, after the union breached the duty of fair representation. *Id.* at 1172-74, 1178.

when the union has determined that the employees' collective interests would not be advanced by doing so. *See Allis-Chalmers*, 388 U.S. at 180.

The remainder of the cases on which Petitioners rely are equally unavailing. Petitioners cite a number of cases in which individual employees challenged the conduct of unions that were *not* their certified bargaining representative.[12] That is contrary to the situation here, where individual employees are challenging the decisions of their certified bargaining representative.

Petitioners have not and cannot cite any case that supports their theory that a right of action is available to them under Section 2 First and 2 Seventh to challenge a collective bargaining agreement negotiated by their elected union representative.

B. The Second Circuit's Conclusion That Section 2 First And 2 Seventh Do Not Provide A Direct Right Of Action For Individual Employees Is Consistent With The Court's Precedent And Decisions In The Third And Seventh Circuits

The Second Circuit's decision also is consistent with relevant precedent in the Third and Seventh Circuits. In *Bensel v. Allied Pilots Ass'n*, the Third Circuit held that individual employees do not have a

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[12] *See* Petitioner's Brief at 13-14: *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958) (union sought discharge of unrepresented employees through enforcement of its union shop agreement); *Dwellingham v. Thompson*, 91 F. Supp. 787 (E.D. Mo. 1950) (dispute resolution between carrier and union that was not the employees' bargaining representative resulted in displacement of the employees), *aff'd sub nom., Rolfes v. Dwellingham*, 198 F.2d 594 (8th Cir. 1952).

right of action under Section 2 Second or 2 Ninth of the RLA. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004).[13] The *Bensel* decision is squarely applicable to Petitioners' claims. Section 2 First and 2 Seventh of the RLA, like Section 2 Second and 2 Ninth (the provisions at issue in *Bensel*), relate to the carrier's relationship with the employees' certified representative and the process of making and maintaining agreements with that representative. As the Third Circuit held in *Bensel*, a court must focus on the purpose of the statutory provision at issue in determining whether a right of action exists for individual employees. *Bensel*, 387 F.3d at 318-19. Because Section 2 First and 2 Seventh are designed to foster agreements between a carrier and the certified union representative, and thereby avoid interruptions to commerce, the Second Circuit correctly held that the purpose of those provisions would be undermined if individual employees were permitted to sue to invalidate those agreements. App 12a & 14a.

In *Renneisen v. American Airlines, Inc.*, 990 F.2d 918 (7th Cir. 1993), the Seventh Circuit held that a group of individual pilots could not bring a claim challenging a collective bargaining agreement negotiated by American and the pilots' union under Section 2 of the RLA. The Seventh Circuit's reasoning is directly applicable here:

> RLA Section 2 was not designed to give minority groups within a union a cause of action against their employer when they cannot persuade their

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[13] In *Bensel*, the Plaintiff also asserted a Section 2 First claim alleging that American and TWA failed to negotiate in good faith. *Bensel*, 387 F.3d at 317-318.

> own union to take actions they deem to be in the union's best interest. Since plaintiffs' own union has not challenged the Agreement, we cannot find that the Agreement violates the union's right under the RLA to bargain collectively for its members.

Id. at 924.

III. PETITIONERS' REMEDY FOR THEIR ALLEGED INJURIES WAS THROUGH A CLAIM FOR BREACH OF THE DUTY OF FAIR REPRESENTATION

The Railway Labor Act's insulation of the collective bargaining process from individual employee causes of action does not leave dissatisfied, non-majority union members without a remedy in appropriate circumstances. Well-established precedent permits employees to challenge decisions made and actions taken by their union representative through a claim for breach of the duty of fair representation ("DFR"). And that is just what the Petitioners did in this litigation—they challenged, unsuccessfully, the APFA's decision to enter into the RPA in order to avoid an imminent bankruptcy filing by American. The fact that this challenge was unsuccessful and is no longer being pursued in this Petition does not enliven the alternative claims that they are electing to pursue. As the Second Circuit stated, "[Petitioners'] dispute is [] not with American Airlines, which could not take the action plaintiffs seek without violating the modified CBA, but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim. A claim of this nature is appropriately brought against the union for breach of the duty of fair representation." App. 14a (quoting *Allis-*

Chalmers., 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that the Court found it necessary to fashion the duty of fair representation.")).

The case law regarding the duty of fair representation is well developed. As the Court has stated, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty." *Steele*, 323 U.S. at 202. Plaintiffs' claims involve both the collective bargaining process and the APFA's conduct as the exclusive bargaining representative, conduct which is at the center of the RLA and governed by the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 174, 177 (1967); *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 76 (1991). As such, Plaintiffs can only challenge the RPA by proving that APFA breached its duty of fair representation and that American was a party to that breach.

In this case, the Petitioners failed to persuade either the district court or the court of appeals that the APFA's actions in negotiating the RPA were "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-39 (1953); *Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998), *cert. denied* 526 U.S. 1017 (1999). Now, having abandoned their duty of fair representation claims in this Petition, the Petitioners should not be allowed to engage in an end-run around that outcome and their bargaining representative's exclusive prerogative and

responsibility to act on behalf of the craft or class under the RLA and federal labor policy.

IV. PETITIONERS' STATE LAW CLAIMS ARE PREEMPTED BY THE RLA

The Second Circuit correctly held the Petitioners' state law claims are preempted by the RLA. App. 16a-17a. The Petitioners' remaining state common law claim pursued through this Petition—against APFA and American for alleged breach of and interference with the union constitution—is just another collateral challenge to the collective bargaining processes mandated by the Railway Labor Act.

In bringing this claim, Petitioners seek to use state law to invalidate a collective bargaining agreement negotiated by American and the union representing its flight attendants. Because this state common law claim interferes with the resolution of collective bargaining disputes under the Railway Labor Act and the formation of collective agreements, claims such as this are pre-empted by the RLA. As the Second Circuit found, collective bargaining is "core RLA conduct" and "the imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the 'balance of power' established by the RLA" and "frustrate effective implementation of the [Act's] processes." App. 22a-23a (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986); *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

American adopts the arguments of the APFA in opposition to the Petition on this issue. The collective bargaining procedures of the Railway Labor Act are regulated exclusively by federal labor law and there-

fore "protected against infringement by the states." *Jacksonville Terminal*, 394 U.S. at 381-86 & 384 n.19 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

CONCLUSION

For the foregoing reasons, American respectfully requests that the Petition for a Writ of Certiorari be denied.

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(4)

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In the

Supreme Court of the United States

JILL LINDSAY, *et al.*,

Petitioners,

– v. –

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, a business entity of unknown type, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Mungin v. Florida East Coast Rwy Co., 416 F.2d 1169 (5th Cir. 1969), *on remand*, *Mungin v. Florida East CoastRwy Co.*, 318 F.Supp. 720 (M.D.Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. den'd*, 404 U.S. 897 (1971) 7, 8

Musick, Peeler & Garrett v. Employers' Insurance of Wasau, 508 U.S. 286 (1993) 4, 5

Norris v. Hawaiian Airlines, 512 U.S. 246 (1994) ..... *passim*

Regional Airline Pilots Ass'n. v. Wings West Airlines, 915 F.2d 1399 (9th Cir. 1990), *cert. den'd*, 501 U.S. 1251 (1991) 9

Reneissen v. American Airlines, 990 F.2d 918 (7th Cir. 1993), *cert. den'd*, 510 U.S. 914 (1993) 10

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) ..... *passim*

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 12

Texas & Pacific Rwy. Co. v. Rigsby, 241 U.S. 33 (1916) 5

United Food & Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544 (1996) 3

United Steelworkers of America v. Rawson, 495 U.S. 362 (1990) 13

STATUTES AND OTHER AUTHORITIES

29 U.S.C. §185 (LMRA §301) 13

29 U.S.C. §§ 401 et seq. (LMRDA) 13

29 U.S.C. §411(a)(4) 4

29 U.S.C. §§413 13

29 U.S.C. §431(a)(5) 13

29 U.S.C. §523 13

45 U.S.C. 151 Sixth (RLA) 2

45 U.S.C. 152 First (RLA Section 2 First) ..... *passim*

45 U.S.C. 152 Second (RLA Section 2 Second) 4

45 U.S.C. 152 Seventh (RLA Section 2 Seventh) ..... *passim*

45 U.S.C. 152 Ninth (RLA Section 2 Ninth) 3

45 U.S.C. 155 (RLA Section 5) 2

45 U.S.C. 156 (RLA Section 6) ..... *passim*

29 C.F.R. §402.2 13

Respondents don't dispute many of the Petition's points. They don't dispute "*Garmon*'s" inapplicability to the Railway Labor context. (They claim the Second Circuit applied "DFR preemption.") They don't dispute that when courts imply causes of action, they must satisfy Article III standing requirements. (They pretend those without Article III standing have it, and those who have it, don't.) They don't dispute the Second Circuit's use of "DFR law" (a 1944-vintage federal common law doctrine) to eclipse statutory rights created in 1926. (*I.e*, they don't dispute Petitioners' "hybridization" and "overhybridization" theses. Pet-22-24.) Finally, they don't dispute the Second Circuit's Opinion

- leaves unionized employees with only one basic labor right and one cause of action — a DFR claim against their union;
- permits a union — in the name of "majority rule" — not simply to negotiate a prospective agreement, but waive vested rights; and
- permits unions to often claim sole right to represent members, non-members, retirees and ex-employees in court.

Because the Second Circuit ignored significant differences between the NLRA and RLA and ruled on grounds applicable to both, its decision impacts all sectors. Because the decision contradicts this Court's precedents, several statutes, and supplants state law, and Circuits are divided on three issues, certiorari is required. The arguments Respondents do make don't justify allowing important statutory and constitutional questions to go unexamined and deep-rooted Circuit-splits to go unresolved.

Setting The Record Straight:

The Claims: Respondents pretend that, rather than Petitioners' RLA and state claims, DFR claims were always at the heart of their case. The opposite is true.

Respondents pretend that, because Petitioners' claims share a common nucleus of operative facts, they are "identical". In fact, their statutory claims implicate "bargaining conduct" and "negotiations;" their state-law claims do not. They concern post-negotiation conduct and ratification balloting, neither "central to" nor at the Act's "core." (Pet-32).

Finally, in an effort to alter the Article III standing calculus, Respondents pretend Petitioners only seek the RPA's invalidation and not damages.

The Act: Respondents treat the Company and Union as contractual "parties."[1]

But, "carriers" and "employees" are the "parties" under the Act.[2] A "labor organization" is merely a "representative." 45 U.S.C. §151 Sixth. There are three problems with Respondents' conceit that APFA is a "party:" First, calling it one does not make it one within the plain meaning of the statute. Second,

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[1] Opp/U-26 ("APFA ...[is] the other party to the bargaining relationship;" Opp/U-13 (characterizing the RPA as "a CBA regulated by ... the RLA" between the "parties (APFA and American)."

[2] RLA §§155, 156 and 152-Seventh expressly refer to **the "carrier"** and **"its employees"** as the **"parties"** to **agreements "covering rates of pay, rules, or working conditions,"** and as the **"parties interested in intended changes"** to such **agreements**.

even assuming it had standing to seek declaratory or injunctive relief, that standing would not be exclusive. Third, only the employees here have standing to seek damages. *Cf. UFCW v. Brown Group*, 517 U.S. 544 (1996).

I. WHY CERTIORARI SHOULD BE GRANTED ON THE STANDING ISSUE.

A. The Decision Wreaks Havoc with Article III Principles And Statutory Text.

Respondents miss one of Petitioners' principal points: that where the statute does not specify, Article III is the touchstone for deciding in whose favor a cause of action should be "implied." In some instances, it will be the union;[3] in others, employees; in many, both. As always under Article III, it depends upon who has suffered the injury.

Respondents assert that the union is the only party ever entitled to assert a claim under 152 Seventh or First. Neither of their grounds for so asserting is tenable.

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[3] Where a carrier has refused to bargain, a union can usually seek a bargaining order under 152 Ninth and/or Seventh. In such cases — *e.g.*, many cited at Opp/Co-18-n.11 and Opp/U-28-29-n.22 — the union has itself suffered an injury. Here, however, no bargaining order was sought because plaintiffs are not the bargaining agent. The focus of Petitioners' RLA claims has always been: restoring employees' wages and benefits. As they alone suffered that injury, they alone have standing.

1. The Union's Status As Exclusive Bargaining Agent Neither Confers Article III Standing Nor The Right To Control Employees' Claims.

This Court already rejected the Second Circuit's and Respondents' core thesis. *See* Pet-17, discussing *Elgin v. Burley* (the fact that a union "occupie[s] the position of collective bargaining agent" does not necessarily mean it also has authority "to settle" or "represent" employees on claims). Congress has as well. 29 U.S.C. §411(a)(4)(union members' right to sue enshrined in LMRDA Bill of Rights).

Even had they not, under the facts presented here, the Union could not satisfy the "irreducible constitutional minimum" of Article III standing.[4]

2. The Panel Misread The Status Quo Provisions

When Congress creates a private right of action, but leaves it to the courts to define its contours, their mission is:

> "not to assess the relative merits of ... competing rules, but rather to attempt to infer how the ... [enacting] Congress would have addressed the issue had ... [it] included ... an express provision [for a private right of action] in the ... Act.

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[4] Because the injury §152 Seventh protects against is a diminution in pay and benefits, it cannot claim to have been injured. It cannot satisfy the "causation" requirement because it participated in the violations. And, it cannot satisfy the redressability requirement since any recovery belongs to the employees.

Musick, Peeler & Garrett v. Employers' Insurance, 508 U.S. 286, 294 (1993) (material in brackets added). Rather than conduct that inquiry (which would have been informed by cases such as *Texas & Pacific Rwy. v. Rigsby*, 241 U.S. 33 (1916)), the Panel decided this case in accordance with its own sensibilities and policy preferences (for a concept of "majority rule" that is all-pervasive, PetApp-10a-16a, and in favor of "hybridization" and "super-hybridization," Pet-22-24, PetApp-9a-14a-24a-25a). It then achieved these objectives by subordinating *Cort's* first factor to its second and third. (PetApp-11a-12a-15a). In the process, it interpreted a statute intended to protect employees as only protecting their union. (PetApp-9a).

B. The Assertion Circuits Are Not Divided On Employee Standing Is Mistaken

At Pet-13-14, Petitioners discuss seven Circuit cases which, either explicitly or implicitly, recognize employee standing to sue for violations of the RLA's status quo. Respondents assert "[n]one of the cases ... apply to Section 2 First or Seventh," and there is "no judicial support" for implying rights of action in employees' favor. (Opp/Co-15; Opp/U-28-24). They also claim each case was "*brought by the union* ..., rather than individual employees." (Opp/Co/17-18). Review of those seven cases proves them wrong.

The cases fall into two categories: cases in which employees were awarded relief under an at-issue status-quo provision, or in which employees' standing was implicitly recognized.

1. Circuits in Which Employees Sued And Were Awarded Relief

The Fifth, Sixth and Eighth Circuits have explicitly acknowledged employees' standing or affirmed rulings in their favor.

Dwellingham v. Thompson, 91 F.Supp. 787 (E.D.Mo. 1950), *aff'd sub nom*, *Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952), concerned a jurisdictional dispute between waiters and stewards, each of whom had a different bargaining agent and CBA. As part of settling a strike, certain issues were submitted to an Adjustment Board.

After the Board awarded disputed positions to the stewards, their union demanded the waiters be discharged. When the Railroad complied, six waiters (not their union) sued under 152 Seventh on behalf of a class "for a preliminary and permanent injunction restraining any action pursuant to the award and restoring plaintiffs to the disputed jobs, and for damages." 91 F.Supp. at 791. They sued the carrier and [stewards'] union.

The District Court ruled the "removal of plaintiffs from their jobs constitute[d] a change in 'working conditions' within the meaning of [RLA] Section 2, Seventh of the Act," *id.* at 795, entitling plaintiffs to prior Section 6 notice. The Union appealed, arguing that the Railroad's discharge of the waiters did not violate status-quo obligations.

The Eighth Circuit affirmed, noting "[w]hen the ... [discharge] was found to be wrongful and violative of the provisions of the Act, it was the duty of the court,

and it properly acted, to restore the plaintiffs to their position." 251 F.2d at 287.

B.R.T. v. Smith, 251 F.2d 282 (6th Cir. 1958), involved employees with "dual" job status as conductors and trainmen. As trainmen, they were members of the trainmen's union (BRT), covered by a BRT-negotiated CBA, and subject to a "union shop" provision. As conductors, they were members of the conductors' union (ORC) and an open shop.

When they paid their dues to ORC, but not BRT, BRT demanded the Railroad discharge the men and it complied. One employee filed a class action under 152 Seventh, naming the Railroad and BRT. ORC joined as a plaintiff.

The District Court held the agreement to discharge the employees violated 152 Seventh, and enjoined the Railroad and Union from implementing it. BRT alone appealed, but on grounds implicating the Railroad. The Sixth Circuit affirmed, agreeing "the action contemplated ... by BRT and the Railroad is illegal, ... a valid cause of action is stated and the District Court rightly granted the injunction." 251 F.2d at 287.

Finally, the *Mungin* cases[5] involve successive changes in working conditions by a railway in violation of §§152 Seventh and 156. 416 F.2d at 1172, 1173, n.21. First the Government sued and obtained an injunction. *Id.*, n.16. Then various unions sued for contempt orders. Finally, union members sued for

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[5] *Mungin v. Florida East Coast Rwy*, 416 F.2d 1169 (5th Cir 1969)("Mungin I"); *Mungin v. F.E.C.*, 318 F.Supp. 720 (M.D.Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971)("*Mungin* II").

damages. The District Court dismissed their complaint. On appeal, the Fifth Circuit reversed, noting the case was "new" in only two respects: "the suit was by employees, not by a union, and ... the relief formally prayed for was a money award." *Id.*, 1174. Neither gave it pause. It held, where employees prove their allegations, "the courts may grant suitable relief," *id.*, and such relief could include backpay or damages. (1177).

> "So much would surely have been mandated had this suit been brought by IARE. Is it any different now that it was brought by the members?"

416 F.2d at 1178. The Circuit easily answered no.[6]

2. Circuits In Which Employees Were Implicitly Recognized As Having Standing

Four Circuits have implicitly recognized employees' standing to sue for violations of the status quo.

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[6] Respondents attempt to distinguish *Mungin* on the grounds that "unlike the situation here" (Opp/Un22), there, "the union breached the duty of fair representation." (Opp/Co-18-n11; Opp/U-29-n.22). The DFR allegation is a red herring. The *Mungin I* Court was ***required*** to assume the truthfulness of alleged union wrongdoing because the complaint was dismissed on the pleadings. 416 F.2d at 1172-1175. On remand, the Union intervened and was exonerated. 318 F.Supp. at 731-732 ("IARE ... acted in good faith," *not* in breach of its DFR). The employees were again found to have stated valid claims, a class was certified and settlement approved. The Fifth Circuit summarily affirmed. 441 F.2d 728.

In *R.A.P.A. v. Wings West Airlines*, 915 F.2d 1399 (9th Cir. 1990), an association and pilot sued an airline for altering working conditions before the newly-designated union could commence bargaining. They sought injunctive relief and damages under 152 First. The Association sued "in a representative capacity on behalf of the pilots," 915 F.2d at 1400 n.1 — *not* in its own right — and the pilot sued for a class.

The District Court dismissed the case as presenting a "minor dispute," over which it lacked jurisdiction. The Ninth Circuit held that "jurisdiction exists to enforce section 2, First, ... but that the prerequisites for stating a claim under ... *Chicago & N.W. Ry.* do not exist under the facts of this case." 915 F.2d at 1403. In ruling on the merits of the 152 First claim, the Court implicitly recognized the pilots' standing.

The same is true with respect to each of the three remaining cases — *Carbone*, *Hilbert* and *Kushto*.[7] In each, employees sued their carriers for violating the status quo and, after examining the facts, the courts dismissed the claims as failing to make out "major

[7] *Carbone v. Meserve*, 645 F.2d 96 (1st Cir. 1981); *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881 (7th Cir. 1961); *Kushto v. B.R.A.C.*, 818 F.2d 290 (4th Cir. 1987).

disputes."[8] They held "minor disputes" had to be submitted to an Adjustment Board.[9]

Since determining whether a claim presents a major or minor dispute is a complex, time-consuming and fact-intensive process, it would make absolutely no sense for courts to engage in that process if employees have no standing to be in court in either event. It necessarily follows that the many courts that have made these determinations believe employees *have* standing as to "status quo" claims.

There is thus a 7:2 or 6:3 split on the question among the Circuits. The Second and Third Circuits have held that employees don't have standing to litigate "status quo" claims. The First, Fourth, Fifth, Sixth, Eighth and Ninth Circuits either assume or have held they have standing. The Seventh Circuit has supported both positions.[10]

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[8] In *Carbone*, "spare board members" sued their carrier for altering their working conditions in violation of §6, *see* 645 F.2d at 98-99, by reducing the number of dispatchers. Perhaps misled by the Circuit's convention of collectively referring to plaintiffs as "the union" (*id.*, 97-n.1), Respondents mistakenly characterize the suit as not brought by employees. Plaintiffs included individual spare-board members.

[9] At the time, courts believed they lacked jurisdiction over "minor disputes." It has since become clear they only lack "primary," not "subject matter" jurisdiction.

[10] *Compare Reneissen, supra* (employees not have standing under 152 First) with *Hilbert, supra* (employees assumed to have standing under 156 and 152 Seventh) and *B.M.W.E. v. CSX*, 478 F.3d 814 (7th Cir. 2007)(standing assumed under 152 Seventh; *see* note-1 for reference to employee-parties).

C. The Circuits Are Divided On Whether A Union Can Ever Represent Retirees Or They Alone Have Standing.

Respondents don't dispute the existence of the four-way Circuit-split described at Pet. 20-22 on this question. Rather, they pretend it is irrelevant. (Opp/U-27-n.18). In fact, one-third of Plaintiffs and several thousand putative-class members are retired or former employees, or *ex*-furloughees. (JA-5197-¶53)(Contra Opp/U-27-n.18).

Because the standing issue is clearly presented and the plaintiff group contains both retirees and ex-employees, this case affords the perfect vehicle for resolving this controversy.

II. WHY CERTIORARI SHOULD BE GRANTED ON THE PREEMPTION ISSUE.

A. Respondents Have Tacitly Conceded Petitioners' *Garmon* Arguments.

At Pet-33-34, Petitioners describe the Circuit-split that has proliferated over whether *Norris* or *Garmon* pre-emption applies under the RLA. At Pet-25-36, Petitioners demonstrate why *Garmon* is inapplicable.

Respondents pretend there is no "divergence." What appears to be a "split," they suggest, is nothing more than two compatible doctrines being applied in two different spheres — with "*Norris/Lingle*" only applicable to "minor disputes" (Opp/U-22); and *Garmon*, to "major disputes."

There are two problems. First, saying that "Norris/Lingle" is only relevant to cases involving a minor dispute is like saying the provisions of the

criminal code are only relevant to those who turn out to be guilty. The whole point of the *Norris/Lingle* doctrine is to distinguish those cases in which RLA preemption is warranted from those in which it is not. Second, on its face, the Opinion below clearly rejects any "different spheres" interpretation. (PetApp-19a-20a)(*Garmon* preemption applicable "to major RLA disputes, ... minor RLA disputes, ... and to RLA issues ... not falling squarely within either category").

Knowing the Circuit-split won't disappear, and apparently unable to answer Petitioners' *Sears Roebuck* and *Davis* arguments (Pet-9-11, 27-31, 31-33), Respondents rewrite the "Part C" of the Panel's decision. By focusing on the DFR liability standard and eliminating all but a passing reference to *Garmon*, they transform the decision from a "Garmon" into a "DFR" preemption decision. (*Cf.* PetApp-16a-24a with Opp/U-13-24).

However, the Second Circuit clearly applied *Garmon* to preempt Petitioners' claims and, unless reversed, it is that opinion *as written* that will be applied by courts and guide litigants. In the event, the "DFR Preemption" theory is itself fatally flawed.

B. Respondents' "DFR" Theory Elevates Federal Common Law Over Express Congressional Intent

So enamored are Respondents with the DFR liability standard and the possibility that it can be used as an all-purpose liability shield that they have also made it the centerpiece of their preemption defense.

Their thesis is that permitting employees to enforce rights under their Union Constitution would frustrate DFR law and, therefore, also the RLA. (Opp/U-23-24). The unstated proposition is that DFR law does not so much establish *a basis* for liability, as *an exemption* from it. That is, it exempts unions from any contractual or other liability that does not precisely fit the *O'Neill* mold.

Both Congress and this Court have rejected that position. This Court has made it clear that, in addition to the DFR, which attaches automatically, a union can assume additional obligations "by contract." *U.S.W.A. v. Rawson*, 495 U.S. 362, 373 (1990), *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987). And, Congress resoundingly rejected Respondents' thesis when it passed the Labor-Management Reporting and Disclosure Act. Not only does the statute expressly require every union it covers to adopt a constitution, but every constitution to address twelve specific subject areas. 29 U.S.C. §431(a)(5); 29 C.F.R. §402.2. One area required to be covered in detail is the "procedures" for the "ratification of contract terms." 29 U.S.C. §431(a)(5).

Can it really be supposed that Congress required these procedures to be written down and disclosed if it did not intend the membership to be able to enforce them? Hardly, and any doubt on that score is eliminated by Congress' inclusion of two "savings clauses," 29 U.S.C. §§413, 523, which expressly preserved employees' remedies. They represent "disclaimers of preemption."

Permitting employees to enforce "ratification rights" doesn't frustrate Congress' purpose; preempting such claims does.

Conclusion:

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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1113 Proposal" detailing the cost reductions the Company would seek from its flight attendants under the Bankruptcy Code if the Company filed for bankruptcy. The § 1113 Proposal contained flight attendant cost reductions of $ 470 million annually, i.e., $ 130 million a year more than the reductions the Company was requiring in a consensual agreement with APFA. The company indicated that, over and apart from additional furloughs that would result from implementation of the $ 470 million in annual cost reductions contained in the § 1113 Proposal, the grounding of 85 to 90 aircraft that the Company intended to effectuate if it filed for bankruptcy would result in 2,500 additional flight attendant furloughs.

C. APFA and American Reach a Tentative Agreement on March 31, 2003

The APFA negotiating team reached a tentative Restructuring Participation Agreement ("RPA" or "Restructuring Agreement") with the Company on March 31, 2003. The tentative RPA contained a 15.6% wage cut; reductions in some "premium pay" categories; a 33% reduction in vacation; reductions in the per diem, layover rest time, sick leave and the monthly guarantee; waiver of crew meals; and a number of work rule changes that would result in the need for fewer flight attendants to perform the assigned work. It was estimated that the work rule changes would result in 2,391 flight attendant furloughs. The RPA, as initially agreed to, was to become amendable on April 30, 2009.
On March 31, 2003, the RPA was submitted to the APFA Executive Committee. The Executive Committee received a briefing from the negotiating team on the RPA and adopted a Resolution that

included the following determinations: (1) the APFA President and negotiating team had "vigorously attempted to secure the best agreement that could be reached under the circumstances, given the serious, substantial threat of an imminent bankruptcy filing" by American; (2) the tentative RPA was "the best proposal that could be obtained under the circumstances and taking into consideration the serious, substantial threat of an imminent bankruptcy filing"; (3) "if agreements are not ratified by the Company's employees, there is a great likelihood that the Company will promptly file a bankruptcy petition and that, in the event of such a filing, there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions which exceeds those provided" under the tentative RPA; and (4) "given this reality and in light of the circumstances presented . . . the best interests of the APFA-represented flight attendants will be furthered by ratification of the Company proposal presented to the Executive Committee for its consideration." The Executive Committee directed the tentative agreement be submitted to the APFA membership for ratification. At this point, the parties had yet to agree on final contract language.

III. The Balloting Process

A. The BOD's Adoption of an Expedited, Telephonic Balloting Procedure

The APFA Constitution requires that a ratification vote on a tentative agreement be conducted via mail-in ballot over a 30-day period commencing with the distribution of the agreement's final language. [6] Art. XI

§ 1(C), (E)(2). Ward voiced strong concerns with the Company's imposed ratification deadline, but the Company reiterated that it would file for bankruptcy if the Union did not meet the April 15 ratification deadline. If the membership ratification vote was conducted over a 30-day period, the balloting would conclude after the Company-imposed April 15, 2003 deadline and thus, as per the Company's threats, after the Company had filed for bankruptcy.

On March 19, 2003, the APFA BOD had met by teleconference to discuss how to conduct a membership ratification vote if a tentative restructuring agreement were reached between APFA and American. During its deliberations, the BOD received a memorandum dated March 17, 2003 from the APFA Constitution Committee that had drafted the APFA Constitution. This group of former union leaders reported to the BOD that it had unanimously agreed to the following:

> in drafting the Constitution, the Committee never contemplated the potentially urgent need for ratification that can arise -- as it apparently has now -- in the context of concessionary bargaining. We are confident that had we considered that issue, the Committee would have drafted and recommended an expedited ratification process. Tellingly, in the one situation the Committee did anticipate in which there is an urgency to ratify -- reaching an agreement to end a strike -- the Constitution does provide for a very quick ratification procedure. (See Article XI.2.) Moreover, the Constitution grants the Executive Committee and the Board of Directors broad powers to take

> necessary actions to protect and promote the interests of APFA members.
>
> In light of these provisions, we believe that inherent in the Constitution is Executive Committee and Board of Directors power to deal with a bona fide emergency. Even though the explicit time frame in Article XI.E(2) is 30 days, it would be inconsistent with the spirit of the Constitution to sacrifice the interests of the membership in the name of compliance with a provision that was never intended to govern the exigent situation now confronting us.
>
> Therefore, the Constitution Committee strongly urges APFA to file a lawsuit in Texas state court in Tarrant County seeking a declaratory judgment that the Executive Committee has the constitutional authority to shorten the ratification period if APFA and the Company reach agreement on modifications to the contract. . . . APFA legal counsel would be able to advise the Executive Committee and the Board of the impact such a declaratory judgment would have on potential member challenges to a shortened ratification period. An additional option would be to ask the Company to indemnify APFA for any legal costs and liability that arise if APFA members sue the Union about the ratification issue.

The APFA BOD passed a resolution interpreting the APFA Constitution to allow for telephonic balloting, stating that telephonic balloting was not available when the current APFA Constitution was adopted and that

an alternative to a mail ballot had not been specifically excluded by the Constitution. The resolution provided for a 15-day telephonic balloting process in light of "this potential unprecedented and time sensitive situation." The BOD also stated that using a mail-in ballot for voting on the RPA "would not be in the best interests of the flight attendants" and that "the potential exigent circumstances [required] an expedited balloting process." APFA provided the March 19, 2003 BOD Resolution to the membership along with information on telephonic balloting.

At its March 19, 2003 meeting, the BOD chose the American Arbitration Association ("AAA") to provide telephonic balloting services. On March 31, 2003, AAA mailed to APFA's members ratification ballots that included instructions for voting by telephone on the tentative agreement. Consistent with established practice at APFA, the balloting period commenced with the March 31, 2003 mailing. However, while ballots were mailed on March 31, no one who accessed the AAA voting system could vote until April 3, 2003, when the system was activated. The balloting deadline was April 15, 2003 at 10:00 a.m. CDT.

B. The Membership's Awareness of the RPA's Terms and Final Contract Language

Throughout the February-April 2003 period, APFA utilized its website and telephone hotline, along with other means of communications, to provide information to the membership on events transpiring, including the Resolutions adopted by the BOD and the Executive Committee.

The APFA Constitution, Art. XI § 1(C), required the membership to receive full contract language at the outset of any ratification balloting process. However, because the tentative agreement was not reached until the Company's March 31 deadline, full contract language had not been finalized prior to the commencement of the ratification period.

On April 1, 2003, and before members began to cast ballots, APFA posted a detailed description of the RPA's terms, as they then stood, on the APFA website; this included all the concessions that had been included to arrive at the $ 340 million cost reduction figure. APFA also recommended that flight attendants not vote until they received final contract language.

Also on April 1, 2003, Ward resumed meetings with the Company in order to arrive at final contract language. However, the terms tentatively agreed upon on March 31, 2003, were not finalized until April 8, 2003. Upon finalization, the contract language was posted on the APFA website and mailed by APFA to the membership. Even after this language was submitted to the membership, and continuing until April 14, 2003, APFA attempted to negotiate further terms providing benefits to the membership.

On April 9, 2003, APFA conducted a nationwide Webcast to provide members with a detailed review of the RPA. Members could either view the Webcast at select meetings across the country or via a personal computer. However, technical difficulties ensued, and many members could not view it. After April 9 and for the remainder of the balloting period, the Webcast remained on the APFA website.

Throughout the balloting process, including during the Webcast, Ward characterized the RPA as a highly concessionary agreement. He urged members to vote, citing the importance of the issues before them.

C. Changes to the RPA's Terms After March 31, 2003

Between April 1 and April 14, 2003, various changes were made to the RPA, all potentially beneficial to APFA, including the Company's agreement to (1) shorten the duration of the RPA by four months; (2) permit the Union to serve an early notice to reopen the agreement and begin negotiations in January 2007; (3) provide for the possibility of mid-term wage increases in the event certain financial markers were met by the Company (increases that could supplement the annual 1.5% pay increases that were provided in the RPA); and (4) shorten the time in which stock options granted to flight attendants in the RPA would vest. APFA made no additional concessions. APFA notified its membership of the post-March 31 changes via the APFA website and Hotline.

D. APFA Efforts to Secure More Time for the RPA Ratification Process

APFA made several attempts to secure from the Company additional time beyond the April 15, 2003 Company-imposed deadline for completion of the RPA ratification process. It did so (1) to afford members additional time to consider the RPA, including its final language, and the additional enhancements that the Company had agreed to after the balloting had commenced; and (2) to accommodate a number of

members who had reported difficulties in obtaining ballots or Personal Identification Numbers ("PINs"). Prior to the scheduled close of the RPA balloting period on April 15, 2003, the Company refused each APFA request for an extension.

In the early morning of April 15, 2003, and before the then-scheduled 10 a.m. CST conclusion of the RPA balloting that day, American's then-CEO Carty convened a meeting with APFA national officers and leaders from the other two Unions. At the meeting, Ward stated that some APFA members were having "problems getting [PIN] numbers" and accessing the telephonic vote lines from overseas, Lorraine Mase-Hecker (former American Director of Employee Relations) Dep. 149-50, and understood that others had complained that the final language became available only on April 8, 2003. Also at the meeting, an APA officer indicated that APA had received reports of APFA members expressing to APA-represented pilots a desire for the opportunity to change their votes, as the memberships of APA and TWU had been able to do throughout the balloting. Also, Carty had learned from several sources that, if allowed to re-vote, many flight attendants would change their votes to "yes." Carty believed that, given one more day, the RPA would be ratified.

Following the discussion, Carty offered to permit a brief extension in APFA balloting until 5 p.m. on April 16, 2003, and to defer a bankruptcy filing for this additional day. In response, Ward stated that this was insufficient and requested an extension of several days. The Company refused. Ward stated he would have to present the Company's offer to the BOD.

On the morning of April 15, 2003, Linda Herod-Rivas (American flight attendant and APFA National Balloting Committee ("NBC") member) and NBC member Leatha Harding-Berry were present at AAA's offices in New York City to receive the ballot results scheduled to be tallied that day. Shortly after 10 a.m. CST on April 15, 2003, the AAA informed Herod-Rivas that the initial balloting period had yielded 9,842 "no" votes and 9,309 "yes" votes. Both the APA and TWU memberships ratified the RPA.

E. APFA Accepts American's Offer of a One-Day Extension for Balloting

The BOD met by teleconference during the afternoon of April 15, 2003, to consider the Company's offer of a one-day extension. By noon, the BOD learned via news report that ratification had failed. [7]

At the conclusion of the April 15, 2003, teleconference, a majority of the BOD adopted a Resolution stating that the extension offered by American was

> shorter than desired, [but] that the best interests of the membership will continue to be served by taking all necessary action to avoid a bankruptcy filing if possible, and that this can best be accomplished under the present circumstances and in light of the intervening events . . ., by permitting flight attendants a further opportunity to vote and/or to change their votes if they so desire on the Company proposal.

The Resolution further states that the BOD's decision to accept the extension and permit members the option of changing votes was based on several factors, including that (1) final language for the RPA was completed "several days after the balloting period had commenced"; (2) "additional agreements" had been reached during the balloting period providing enhancements to the RPA, "including as recently as 8 p.m. on April 14, . . . which could have impacted the voting if additional time had been available for consideration by the flight attendants"; (3) "the APFA membership has voted to reject the Company proposal by a very slim margin"; (4) "there remains a high likelihood of an imminent bankruptcy filing by the Company"; (5) "in the event of a bankruptcy filing, there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions which exceeds those provided under the Company proposal that has been presented to the membership for a ratification vote"; and (6) "a number of flight attendants reported that they were unable to cast votes and/or [encountered] extensive difficulties and confusion...with the voting process."

APFA informed the Company that the BOD had agreed to the extension. APFA also informed its members, through its hotline and website, that RPA balloting had been reopened and would continue until April 16, 2003 at 5:00 p.m. CST and that members could change their votes during this balloting period. The hotline also notified members that the RPA had not achieved ratification during the initial balloting period. The RPA ratification balloting reopened at around 4:30 p.m. on April 15, 2003 and continued through 5:00 p.m. CST on April 16, 2003.

F. Balloting During the Extended Voting Period

Approximately 1,300 members voted for the first time during the extension period and any member who previously voted was permitted to change her or his prior vote. Flight attendants who had previously voted had the option of (1) changing a prior "no" vote to a "yes" vote; (2) changing a prior "yes" vote to a "no" vote; (3) voting the same way they previously had voted; or (4) not recasting a ballot, in which case the vote cast during the pre-extension balloting period was counted in the final tally. [8]

At the conclusion of balloting at 5 p.m. CST on April 16, 2003, there were 10,761 "yes" votes in favor of approval of the RPA and 9,652 "no" votes against approval of the RPA. At this point, APFA and American considered there to be a ratified RPA. Using records furnished by AAA, the NBC contacted a number of flight attendants identified by AAA as having cast a ballot during the extension period in order to verify that these flight attendants in fact had cast a ballot -- but not how they voted -- as reflected on AAA records. Each flight attendant the NBC contacted verified that she or he had cast a ballot during the extension period.

G. American's Direct Communications With APFA Members

At or around the commencement of the voting period, American's then-CEO Carty, on "four or five" occasions, made speeches directly to union members in which he said "voting no is a vote for bankruptcy" and "voting no is a vote for additional job cuts." Carty Dep. 86-87. He further stated that, if American were to file for

bankruptcy, there would be an additional $ 500 million in employee cost cuts, including the cutting of 1000 more pilot jobs and 2500 flight attendant positions. Carty's purpose was two-fold: "[o]ne, make it very clear to our employees what the facts were, and two, I think to hold out to them that in spite of the challenges we were facing and the very difficult decisions we all had to make here, that if we could avoid bankruptcy, there clearly was opportunity going forward." Carty Dep. 89. The speech was written "very much with a carrot[, as opposed to a stick,] in mind." *Id.* Carty "very much wanted to see the company avoid bankruptcy." *Id.* at 90. He believed the only way to avoid bankruptcy at that point was for the unions to ratify the RPAs.

During the balloting extension between April 15 and 16, 2003, the Company again communicated with American flight attendants. American personnel approached flight attendants at airport gates and arranged for a "pop-up" message to appear when flight attendants signed into the computer system upon arriving for work which advised them of the extension and their ability to re-vote. American also prepared a written message, copies of which were placed under the doors of flight attendants' hotel rooms. This message stated:

> The company was advised this morning that the APA and TWU consensual agreements have been ratified. The APFA is the only union that has not yet ratified its agreement. However, the [APFA] has advised us that, unlike the other union groups, once members initially voted, they were not able to change their position, even after the contract was improved during the ratification process.

> In an effort to give flight attendants the same opportunity available to other union employees, and in consideration of the importance of this matter to American, all of its employees and their families, since a final failure to ratify would cause a bankruptcy filing by the Company, the Company has agreed to the APFA's request to extend the voting period until 5 p.m. CDT, Wednesday, April 16 during which time flight attendants will be permitted to change their ballots if they wish to do so. No one is required to vote again. Any votes not changed will be counted as they currently stand.
>
> This message is to advise you of this development and encourage you to participate in this vital process. If you did not have an opportunity to vote or wish to change your vote you may call the [AAA]. . . . Additionally, you can call [the AAA] if you have any questions or have misplaced your PIN number.

Through Americans' computer systems, phone lines, bulletin boards, in hotels, in crew lounges and at airports, the Company provided this message or similar messages to flight attendants regarding the RPA balloting, the extension, and the ability to change votes. One flight attendant, Anne Galazin, was provided information on eight occasions. The repeated communications "frustrated" her, causing her to consider, if anything, changing her "yes" vote to a "no" vote. Galazin Dep. 60 61. Further, according to reports received by APFA, American reimbursed some flight attendants for the cost of telephone calls to the RPA balloting line because their foreign locations prevented

them from accessing the 800 number free of charge. Plaintiffs also offer evidence regarding APFA's and American's knowledge of individual flight attendants' ID numbers and perhaps PIN numbers, the manner in which PINs were assigned, and the possibility that flight attendants could surmise others' PINs; they imply a lack of security in the balloting.

American's communications with APFA members "troubled [Ward] greatly . . . [b]ecause the company had no right to insert itself into our internal matter." Ward Dep. 360. Ward recalled hearing other reports that "the company plac[ed] messages at hotels in various layovers, cities, informing flight attendants that they could continue voting, that they could change their vote." *Id.* at 361. Ward "was very upset . . . [and] very angry." *Id.* at 361-62.

APFA considered American's communications to be an inappropriate intrusion into the balloting process. Ward telephoned Carty and Lorraine Mase-Hecker, American's Director of Employee Policy and Relations, in the evening of April 15, 2003, and protested the Company's conduct. On April 16, 2003, Ward faxed a letter to Mase-Hecker which included the following:

> We have received numerous reports of widespread company interference and coercion in the ongoing ratification process since the decision was made to extend the APFA balloting period through 5 p.m. Central Time on April 16. The Company's actions violate the rights of APFA and the flight attendants it represents under the Railway Labor Act and are directly undermining the ratification process. As I

> informed you last night, this conduct must stop immediately.
>
> We have been deluged with complaints from flight attendants expressing outrage at the Company's involvement in the Union's internal voting process and at the pressure tactics being employed by the Company. Once again, the Company is showing total disrespect for the flight attendants and for their designated bargaining representative. And once again, the Company has demonstrated its ability to shoot itself in the foot. In simple terms, we are insisting that the Company BACK OFF AND STAY OUT OF OUR VOTING PROCESS.

This warning "did not cause a halt in the company's actions." President's Report, Ward Ex. 10.

The Company stated its position directly to the flight attendants: "a vote for bankruptcy is a vote against 10,000 jobs and the secure future of 100,000 American Airlines employees." Carty Dep. 52-54. The Company took the position that its actions did not overstep the line of permissible communication.

IV. American Funds Special Bonuses and a Retirement Plan for Company Executives

On the morning of April 17, 2003, the morning after RPA ratification, media reports emerged that 45 Company executives received special retention bonuses and that a Special Executive Retirement Plan (the "SERP") had been funded and would be protected from creditors in the event of bankruptcy. APFA's

leadership had no prior knowledge of the retention bonuses or SERPs.

Ward informed members that "[t]he disclosures on April 17 demonstrated that the company had lied and had not provided the 'most complete and reliable information,'" as it had represented. President's Report, Ward Ex. 10. Thus, "[b]ecause of the company's outrageous conduct and the company's highly improper intrusion into our ratification process during the April 15-16 extension period, [Ward] informed the company that a reballot of the membership was essential." *Id.*

On April 22, 2003, the APFA BOD convened and passed a Resolution setting aside the April 16, 2003 ratification vote as "tainted" and directing the NBC to make arrangements to provide for another RPA ratification balloting of the membership because (1) during the 1-day extension, "the Company actively and improperly inserted itself into the ratification process and inundated and pressured APFA members into casting votes and/or changing their votes, despite APFA's protests, including directly to Company CEO Don Carty"; and (2) American had misled APFA when it represented that it had "provided to APFA prior to conclusion of the Agreement information that 'was the most complete and reliable information available to the Company to the best of its knowledge.'" As directed by the BOD, the NBC prepared for a new ratification vote by mail-in ballot over a 30-day period.

V. The April 25, 2003 BOD Resolution

On April 23, 2003, a four-person Congressional delegation from Texas met with Carty, other top

Company officials, and leaders of the three unions in an effort to resolve the dispute. During this meeting, American argued that the RPA had been conclusively ratified and that APFA could not proceed with a re-ballot. American threatened that, if APFA proceeded with a new ratification vote, it would file for bankruptcy without awaiting the results of the balloting. Nevertheless, American offered certain additional benefits in exchange for APFA's promise to forego a re-vote and honor the April 16, 2003 ratification.

On April 24, 2003, largely as a result of the three unions' demands, Carty resigned as CEO. Gerard Arpey replaced him. APFA, however, declined to drop its challenge.

In the evening of April 24, four APFA Officers met with Arpey. The APFA Officers urged Arpey to defer filing a bankruptcy petition until after APFA completed a new balloting of the APFA membership. They also urged Arpey to eliminate from the RPA, as originally drafted, the modification of the "underfly" provision that had been particularly unpopular with APFA members. Arpey agreed to permit APFA to substitute another concession of equivalent cost-saving value to the underfly provision, but only if, by the morning of April 25, 2003, APFA finalized the agreement and withdrew its prior decision to reballot the membership. Otherwise, American would file for bankruptcy without awaiting the results of the additional balloting.

A BOD meeting was convened by teleconference in the early morning of April 25, 2003 to review the

developments of April 23-24, 2003. The BOD believed it must either (1) end the dispute with American by agreeing to finalize the agreement, secure the additional benefits to which the Company had agreed on April 23 and 24, 2003, and not proceed with a new balloting on the RPA, or (2) refuse to do so, understanding that the Company would file for bankruptcy if there were no agreement to resolve the dispute by the morning of April 25, 2003.

Following debate, the BOD adopted a Resolution on April 25, 2003 that, "with great reluctance and under the circumstances presented, withdr[ew] the direction to the [NBC] to proceed to arrange for another ratification vote" and agreed to "significant improvements to the [RPA] which [American] was not willing to provide previously." The Resolution stated that,

> under the circumstances presented, . . . the best interests of the . . . flight attendants will be served by securing the significant improvements to the . . . APFA Restructuring Agreement to which the Company has agreed since the Board of Directors adopted [the April 22 Resolution] and by forestalling a Company bankruptcy filing, without a further membership vote, rather than proceeding with a further membership vote which will eliminate Company agreement to provide the significant improvements to the APFA Restructuring Agreement and result in an imminent bankruptcy filing by the Company.

The resolution stated that "the Company indicated that it could not await the outcome of an APFA ratification

ballot and would file for bankruptcy imminently in light of APFA's announced reballoting." American "agreed to refrain from filing a bankruptcy petition if it receives APFA's agreement at this time, and without a further ratification balloting vote." Notwithstanding APFA's "vigorous attempt[s] to obtain Company agreement to drop its insistence on finalization of agreement on the improvements to the APFA Restructuring Agreement without a further ratification balloting, . . . the Company . . . refused to modify its position on reballoting." Thus, because "there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions, and additional resulting furloughs of flight attendants, which exceed those that will result under the APFA Restructuring Agreement," the BOD "authorize[d] the APFA President to sign the April 25, 2003 letter of agreement between [American] and APFA."

VI. The April 25, 2003 Letter of Agreement

On April 25, 2003, American and APFA entered into a Letter of Agreement ("LOA") memorializing their "agree[ment] to resolve all disputes which exist between them related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." The parties "agreed that it is in their mutual interest to permit the Restructuring Agreement to become binding and effective." The LOA made the RPA effective beginning May 1, 2003. The LOA was never submitted to the membership for ratification.

The LOA reflected items to which American agreed subsequent to April 22, 2003, including the following

changes to the RPA: (1) a further shortening of the duration of the RPA; (2) a new option for the unions to seek to reopen the RPAs after three years; and (3) a new Annual Incentive Program, which would be more likely to lead to additional payments to the unionized employees, including the flight attendants, than "the Variable Wage Adjustment plan" that had been included in the RPA. With the exception of APFA's promise not to seek a new ratification vote, no other concessions were required by American of APFA.

The parties dispute whether the LOA required membership ratification. APFA asserts that the "enhancements" to which the Company had agreed, on April 23 - 24, 2003, did not reflect "major changes" to the contract with American, such as a change in rates of pay or work rules, and therefore that the LOA did not require membership ratification. Plaintiffs assert that

> each of the following tentative or proposed agreements had to be ratified by the APFA membership: the RPA as originally formulated on March 31, the RPA as amended through April 8, the RPA as amended through April 14, the RPA as amended through April 25 and/or the April 25th LOA in isolation.

The RPA has been in effect since May 1, 2003.

PROCEDURAL HISTORY

The named plaintiffs are twenty-five individuals presently and/or formerly employed by American as flight attendants. Each named plaintiff is a present or former member of APFA and each was a member of

APFA between December 2002 and May 1, 2003. The present case caption reflects three related cases filed in three different venues: *Marcoux, et al. v. American Airlines, Inc., et al.* (No. 04-1376) ("*Marcoux*"), in the United States District Court for the Southern District of New York; *Ford, et al. v. APFA, et al.* (No. 03-4987) ("*Ford*"), in the United States District Court for the Eastern District of New York; and *Lindsay v. APFA, et al.* (No. 04-0634) ("*Lindsay*"), in the Superior Court for the Central District of California, subsequently removed to the United States District Court for the Central District of California. *Marcoux* and *Lindsay* were transferred to this court and consolidated based in part on their being related to each other, to *Ford*, and to the claims set out in the Supplemental Complaint filed by plaintiffs in *Cooper, et al. v. TWA Airlines, LLC, et al.*, (No. 02-3477) (E.D.N.Y.). *See Cooper v. TWA Airlines, LLC*, 2005 U.S. Dist. LEXIS 41007 (E.D.N.Y. July 18, 2005); *Cooper v. TWA Airlines, Inc.*, 349 F. Supp. 2d 495 (E.D.N.Y. 2004); *Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231 (E.D.N.Y. 2003).

Plaintiffs seek an order setting aside the RPA, a declaratory judgment, specific performance of the 2001 CBA, "back wages and benefits plaintiffs would have received but for the imposition of the unlawful agreement," "reinstat[ment of the] flight attendants who were furloughed as a result of the imposition of the [RPA]," compensatory damages from all defendants, and punitive damages from APFA.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A "genuine" issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). That multiple parties "move for summary judgment does not guarantee that there is no material issue of fact to be tried." *Eastman Mach. Co. v. United States*, 841 F.2d 469, 473 (2d Cir. 1988). "In determining whether there is a genuine issue of fact, the court is required to assess each motion on its own merits and to view the evidence in the light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." *Id.*, citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). If, in light of the burdens of production and proof that would be required at trial, there is sufficient evidence favoring the non-movant such that a reasonable jury could return a verdict in that party's favor, a genuine issue of fact exists and summary judgment is not properly granted. *Anderson*, 477 U.S. at 248. Thus, the party seeking summary judgment bears the burden of showing that no genuine factual dispute exists, but the party bearing the burden of proof at trial must, in order to survive summary judgment, make a sufficient showing on the essential elements of its case. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Where the party bearing

the burden at trial fails to make this showing, the movant is entitled to judgment as a matter of law. *Id.*

II. Plaintiffs' RLA Claims

A. RLA Section 152 Seventh

Section 152 Seventh provides:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

45 U.S.C. § 152, Seventh. [9] Plaintiffs claim that the RPA, an agreement that changed the rates of pay and working conditions of APFA's members as embodied in the 2001 CBA, was formed in a manner inconsistent with the requirements of Section 152 Seventh. Therefore, they argue, by complying with it, American violated this provision's status quo requirement. Company Defendants argue that only certified representatives, not individual employees, may bring suit under Section 152 Seventh.

Although RLA Section 152 does not expressly grant a private right of action, *see Bensel v. Allied Pilots Association, et al.*, 387 F.3d 298, 318 (3d Cir. 2004), courts have recognized an implicit private right of action under Section 152 Seventh on behalf of a union against an employer seeking to challenge the employer's unilateral changes in wages and conditions of employment previously fixed by a collective bargaining agreement. *See, e.g., Aircraft Mechanics*

Fraternal Ass'n v. Atlantic Coast Airlines, 55 F.3d 90, 93 (2d Cir. 1995); *International Assoc. of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 781 F.2d 1400, 1408 (9th Cir. 1986). However, that a private right of action may be implied on behalf of a union "does not imply that Congress intended to create a private right of action for any group or groups of individual employees claiming to act on behalf of the relevant employees." *Bensel*, 387 F.3d at 319 (addressing RLA Sections 152 Second and Ninth).

Plaintiffs point to no case where a court has implied a private right of action on behalf of individual employees under Section 152 Seventh. Indeed, of the RLA's several provisions, a private right of action on behalf of individual employees has been implied only as to Section 152 Third and Fourth. *Id.* at 318. Unlike the other provisions of Section 152, Section 152 Third and Fourth "prohibit carriers from discriminating against *employees* in connection with union organizing activities." *Id.* (emphasis in original). Thus, addressing whether an implied right of action may be found under Section 152 Second and Ninth, the Third Circuit found that, "[u]nlike 45 U.S.C. § 152, Third & Fourth, which are directed specifically at the employer's relationship with *employees*, 45 U.S.C. § 152 Ninth & Second are directed at the employer's relationship with the certified *representative*." *Id.* at 319 (emphasis in original). [10]

Like the provisions analyzed in *Bensel*, Section 152 Seventh is directed at the employer's relationship with the employees' certified representative, prohibiting carriers from unilaterally changing "rates of pay, rules, or working conditions of its employees, *as a class as*

embodied in agreements." 45 U.S.C. § 152, Seventh (emphasis added). Thus, only APFA, as the flight attendants' certified representative, could claim a private right of action under this Section. Permitting a private right of action on behalf of individual employees under Section 152 Seventh is inconsistent with this provision's purpose "to impose an obligation on the parties to make every reasonable effort to negotiate a settlement . . . [and] avoid strikes." *Bensel*, 387 F.3d at 315 (addressing the "status quo provisions," including Section 152 Seventh). Section 152 Seventh, designed to foster agreement, would be undermined were individual employees empowered to invalidate settlements previously negotiated by their certified representative and designed to prevent bankruptcy. *Cf. id.* at 319 ("Allowing a group or groups of individual employees to bring a cause of action under section 152, Second or section 152, Ninth of the RLA would undermine the provisions' purpose of providing for an organized process of negotiation between one employee representative and the employer, and could lead to chaos."). [11]

Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 Seventh claim is granted.

B. RLA Section 152 First [12]

Section 152 First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working

> conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First. [13] Plaintiffs claim that, by not reverting back to the 2001 CBA after recovering from its near-bankruptcy status, American failed to maintain the 2001 CBA in violation of RLA Section 152 First. Company Defendants argue that Section 152 First, like Section 152 Seventh, gives no private right of action to individual employees.

Like Section 152 Seventh, Section 152 First is directed at the employer's relationship with the employees' certified representative. Where a union has been certified to act on the employees' behalf, making and maintaining agreements on their behalf is fundamentally the province of that union. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967). As the Supreme Court noted there:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen

> representative to act in the interests of all employees.

Id. Further, plaintiffs' position that Section 152 First, which, *inter alia*, directs parties to "settle all disputes," is directed at the employer's relationship with individual employees rather than their union is untenable when Section 152 First is viewed, as it must be, *in pari materia* with Section 152 Second, which states:

> *All disputes* between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated and authorized* so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

45 U.S.C. § 152, Second (emphasis added); *see also Northwest Airlines*, 483 F.3d at 168 ("carriers and *unions* must 'exert every reasonable effort to make [agreements] . . . and to settle all disputes'") (emphasis added), citing 45 U.S.C. § 152, First; *id.* (Section 152 First "'at least requires the employer to meet and confer with the *authorized representative of its employees.*'") (emphasis added), citing *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

Again, as with Section 152 Seventh, the purpose of Section 152 First - "to avoid any interruption to commerce or to the operation of any carrier," 45 U.S.C. § 152 First - would be undermined were individual employees permitted to bring suit seeking to invalidate

agreements negotiated by their union and designed to avoid such interruptions.

Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 First claim is granted.

C. RLA Section 152 Fourth [14]

Section 152 Fourth provides, in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. . . .

45 U.S.C. § 152, Fourth. Both plaintiffs and Company Defendants seek summary judgment on plaintiffs'

Section 152 Fourth claim. Plaintiffs alternatively argue, in opposition to Company Defendants' motion, that fact issues remain precluding summary judgment against them.

Plaintiffs claim that American interfered with the process of ratifying the RPA by pressuring APFA to shorten the balloting period and to use a voting method and technology not previously used or sanctioned by the APFA Constitution. Then, plaintiffs assert, American interfered with the actual vote by conveying its message, not only to APFA leadership, but directly to employees, with the purpose of pressuring members to vote in favor of ratification. Finally, plaintiffs assert, American coerced APFA into reneging on its decision to set aside the April 16, 2003 ratification vote in light of American's disclosure of the SERP accounts, and then pressured APFA into dispensing altogether with membership ratification of the LOA. Company Defendants argue that Section 152 Fourth imposes a high standard on postcertification claims, a standard plaintiffs cannot meet. Alternatively, Company Defendants argue that plaintiffs' claims are precluded by the LOA which resolved all disputes between American and APFA.

Section 152 Fourth is addressed "primarily [to] the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants ("TWA")*, 489 U.S. 426, 440, 109 S. Ct. 1225, 103 L. Ed. 2d 456 (1989). Courts have inferred a right of action to individual employees in the precertification context, recognizing that, in the absence of a certified union and the administrative remedies that arise once a union is certified, individuals

injured by violations of RLA Section 152 Fourth would be without remedy. *See Beckett v. Atlas Air*, 1995 U.S. Dist. LEXIS 11842, *3-4 (E.D.N.Y. Aug. 14, 1995); *see also Bensel*, 387 F.3d at 318. Notwithstanding this precertification focus, a narrow class of *postcertification* claims under Section 152 Fourth may be brought where "'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands'" of the RLA. *TWA*, 489 U.S. at 441, quoting *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S. Ct. 95, 88 L. Ed. 61 (1943). Company Defendants do not dispute that an individual employee has an implied right of action in federal court under Section 152 Fourth in the postcertification as well as precertification context. However, to establish the need for a federal court remedy for an alleged violation of Section 152 Fourth in the postcertification context, plaintiffs must show that

> the employer's conduct has been motivated by anti-union animus or an attempt to interfere with its employees' choice of their collective bargaining representative, or constitutes discrimination or coercion against that representative, or involves acts of intimidation [which] cannot be remedied by administrative means.

Independent Union of Flight Attendants v. Pan Am. World Airways, Inc. ("IUFA"), 789 F.2d 139, 142 (2d Cir. 1986) (internal quotation marks, citations, and ellipses omitted). [15] *IUFA* recognized that, although individual employees typically, with union representation, bring grievances before an RLA-created arbitral board, such efforts would be futile

where, because of improper carrier conduct, the union's effectiveness and/or ability to defend its members' rights under the CBA are compromised. However, because the carrier conduct in *IUFA* was not motivated by anti-union animus and did not "destroy the effectiveness of the union representative," *id.*, the RLA's dispute resolution mechanism was functional. In other words, the system created by the RLA - dependent on effective union representation - had not broken down. As a result, the claim was "administratively cognizable," precluding the district court from exercising subject matter jurisdiction. *Id.* at 143.

In a different postcertification context - the post-mediation self-help period under RLA Section 6 during which certain forms of economic force are permissible - the Supreme Court has held that courts should "hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself." *TWA*, 489 U.S. at 442. *TWA* stressed that no employer or union conduct "prevented the scheme of the RLA from working" - that is, the conduct was not "inherently destructive of union or employer activity." *Id.* Although the dispute in this case did not arise in the post-mediation Section 6 context, the Supreme Court in *TWA* clearly viewed the availability of postcertification relief in federal court as existing only in extreme circumstances.

Accordingly, plaintiffs' argument, based on the statutory language of 45 U.S.C. § 152 Fourth, that they must show mere "interference" with the Union is not persuasive. Whatever the standard applicable where a

union seeks a ruling on a postcertification claim in arbitration, the ability of individual plaintiffs to bring a postcertification claim under Section 152 Fourth in federal court is greatly circumscribed.

Company Defendants, for their part, argue that the very existence of collectively bargained agreements between APFA and the Company, namely, the RPA and the LOA, establish that any anti-union animus claim against them cannot succeed. Of course, courts look to the existence of a collectively bargained agreement as evidence of whether anti-union animus has been shown. *See, e.g., Dempsey v. Atchison, T. & S.F. Ry.*, 16 F.3d 832, 843 n. 8 (7th Cir. 1994) ("As an aside, it would seem that the phrase 'anti-union animus' refers to an employer's general hostility towards union activity. Here, Santa Fe did not demonstrate antiunion hostility; in fact, it dealt favorably with a union, UTU, in executing Side Letter 11."), *cert. denied*, 513 U.S. 821, 115 S. Ct. 82, 130 L. Ed. 2d 35 (1994); *Renneisen v. American Airlines, Inc.*, 990 F.2d 918, 918 (7th Cir. 1993). However, Company Defendant's position, if accepted, would eliminate any possibility of a union member bringing a Section 152 Fourth claim challenging an agreement, even where the union's integrity has been utterly compromised by the company; therefore, it overstates the already difficult hurdle plaintiffs face. Instead, individual plaintiffs must show that anti-union conduct on the part of the carrier compromised the union's ability to represent its members such that individual employees have effectively been deprived of representation and to collective bargaining as contemplated by the RLA.

Company Defendants further argue that the LOA forecloses a postcertification Section 152 Fourth claim because its very purpose was to settle all claims between APFA and the Company. This argument also goes too far. Were the LOA shown to be the product of coercion of the Union by the Company, a claim could be stated.

Here, plaintiffs fall far short of meeting their burden of producing facts sufficient to survive summary judgment. Although plaintiffs identify several facts which, they assert, show Company interference and pressure exerted on APFA and individual members, these facts do not demonstrate anti-union animus, and they do not support a finding that American sought to or did compromise the integrity of APFA, whose leadership supported the agreement. Stated another way, the evidence of the economic pressures which the Company brought to bear in obtaining both the RPA and the LOA does not support a finding by a reasonable factfinder that American was motivated by antiunion animus, or that the pressures were aimed at undermining or compromising the Union's effectiveness. To the contrary, the economic pressures arose from a dire economic predicament to which, as the undisputed facts establish, APFA responded with independence of judgment. Further, that American withheld from APFA information regarding its SERP accounts is not evidence of a Company attempt to undermine APFA's ability to act as its employees' representative. Although American's conduct was deceptive, it did not compromise the integrity of the Union which, upon learning of the existence of the SERP accounts, responded by securing in the LOA concessions beneficial to the membership. No evidence

suggests that this response, or any other APFA conduct, was not the product of the Union's independent judgment.

Similarly, plaintiffs' evidence that American interfered with individual employees' decisions whether to vote for or against ratification is insufficient to meet the standard for a postcertification Section 152 Fourth claim. The parties dispute whether statements relied on by plaintiffs, made to individual employees other than plaintiffs, to encourage them to ratify the RPA, constituted misconduct under RLA Section 152 Fourth. This dispute need not be addressed, however, as the standard in this postcertification case is anti-union animus - that is, the focus must be on the impact of carrier conduct on the Union, not on the individual employees. *See IUFA*, 789 F.2d at 142 (Section 152 Fourth prohibits "discrimination or coercion *against that representative*") (emphasis added). Under that standard, plaintiffs cannot succeed. Indeed, no evidence indicates that American's importuning of individual employees, conduct to which APFA objected, compromised the Union's independence or its ability to protect the interests of its members such that the efficacy of the RLA's dispute resolution mechanism was threatened.

In essence, plaintiffs seek to overturn the RPA and LOA because they disapprove of positions taken by APFA in reaching the agreements and they disagree with APFA's leadership that the agreements are in APFA members' best interests. Based on the undisputed facts, they have failed to show that the integrity of the Union and its ability to bargain on the employees' behalf were compromised by Company

conduct. As the Court of Appeals for the Seventh Circuit held in rejecting similar claims,

> RLA Section was not designed to give minority groups within a union a cause of action against their employer when they cannot persuade their own union to take actions they deem to be in the union's best interest.

Renneisen, 990 F.2d at 924.

Accordingly, Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 Fourth claim is granted, and plaintiffs' motion is denied.

III. Plaintiffs' DFR Claims

All parties seek summary judgment on plaintiffs' DFR claims. As detailed below, plaintiffs urge the court to adopt a "per se" standard of DFR liability. APFA meanwhile seeks judgment under traditional DFR standards enunciated in *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). Plaintiffs assert that, if the court applies *Vaca* and thus rejects their "per se" theory, issues of fact remain precluding summary judgment in APFA's favor. Company Defendants side with APFA and note further that carrier liability on a DFR theory does not lie in the absence of union liability.

A. The DFR Standard

"When a labor organization has been selected as the exclusive representative of the employees in a

bargaining unit, it has a duty, implied from its status . . . as the exclusive representative of the employees in the unit, to represent all members fairly." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L. Ed. 2d 242 (1998), citing, *inter alia*, *Vaca*, 386 U.S. at 177. The DFR requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177. In other words, "a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* (internal citation omitted). To be discriminatory, union conduct must be "intentional, severe, and unrelated to legitimate union objectives," as in the case of invidious discrimination based on race or gender. *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). "[B]ad faith requires a showing of fraudulent, deceitful, or dishonest action." *White v. White Rose Food*, 237 F.3d 174, 179 (2d Cir. 2001) (internal quotation omitted). "Judicial review of union action 'must be highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities.'" *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998), quoting *O'Neill*, 499 U.S. at 67. Finally, if plaintiffs can satisfy the *Vaca* standard, they must then demonstrate "a

causal connection between the union's wrongful conduct and their injuries." *Id.*

B. Plaintiffs' Motion For Summary Judgment

According to plaintiffs, "'fair representation' means different things in different contexts." Pl. Br. 42. Conceding that the *Vaca* standard governs APFA's conduct during *negotiation* of the RPA, plaintiffs argue that APFA's conduct during the RPA *ratification* process - specifically, alleged violations of the APFA constitution - is subject to a "per se" standard of liability under which any such violation amounts to a DFR breach. This "per se" standard, plaintiffs assert, applies to all union conduct during the ratification process because the APFA constitution expressly reserves ratification to the membership and prescribes rules governing ratification to which APFA is bound. *Id.* at 44. Then, arguing that American "participated" in APFA's "per se" DFR breaches, plaintiffs seek judgment holding APFA and Company Defendants jointly and severally liable for breach of APFA's DFR.

Plaintiffs provide no authority for their "per se" theory of liability, and the court is aware of none. In a related case, Judge Amon rejected this argument. *See Cooper, et al., v. TWA Airlines, LLC, et al.*, 274 F. Supp. 2d 231, 247 (E.D.N.Y. 2003). Simply put, the *Vaca* standard "applies to all union activity." *O'Neill*, 499 U.S. at 67. Because the Court rejects plaintiffs' "per se" theory of DFR liability, their motion for summary judgment on their DFR claims, predicated solely on that theory, is denied.

C. APFA's Motion For Summary Judgment

APFA moves for summary judgment on the ground that none of its conduct during negotiation or ratification of the RPA and subsequent LOA fell below the *Vaca* DFR standard. APFA asserts that a union's DFR permits it to apply its constitution flexibly in a manner that the union, in the exercise of its judgment, determines will best protect the represented employees' interests, particularly when faced, as was APFA, with dire circumstances. APFA argues that entering the RPA in an expedited fashion was the only alternative to the near-certainty that American would file for bankruptcy, leaving APFA's membership in a position worse than that contemplated by the concessionary agreement. Then, APFA argues, by entering the April 25, 2003 LOA, it chose to maintain the RPA, now with additions beneficial to APFA's membership, to once again avoid a dire bankruptcy scenario. Plaintiffs assert that issues of fact remain which preclude APFA's motion for summary judgment on the DFR claims.

There is no dispute that APFA was concerned about the strong possibility that, in the absence of significant concessions from the union, American would file for bankruptcy, subjecting union members to employment conditions more onerous than those sought via concession. Viewing APFA's conduct during the negotiating and ratification of the RPA and LOA favorably to plaintiffs, though with appropriate deference to the union, *see Spellacy*, 156 F.3d at 126, APFA's actions were rational and not arbitrary. APFA was faced with the credible threat that, unless it agreed to $ 340 million in annual concessions by the March 31, 2003 and April 15, 2003 deadlines imposed by American, the company would file for bankruptcy. It is undisputed

that American represented to APFA that, in bankruptcy, it would ground 85 to 90 airplanes, causing 2,500 more flight attendant furloughs than if it reached agreement outside of bankruptcy, and that it would seek to impose an additional $ 130 million in labor cost reductions. The evidence establishes that APFA's leadership reasonably believed it had reached the best solution possible on behalf of its members. Therefore, no finding of hostility or bad faith is warranted.

Nor have plaintiffs shown an issue of fact as to whether APFA's decision to accept American's offer to extend the balloting period for 31 hours was arbitrary or made in bad faith. To the contrary, the undisputed evidence establishes that, consistently throughout the initial balloting period, APFA had sought an extension, but American rebuffed these requests, insisting that, if the RPA were not ratified by the April 15, 2003 deadline, American would file for bankruptcy. The evidence also establishes that Ward was concerned that some members were having technical difficulties with voting and that members had complained about not receiving final contract language until April 8, 2003. Also, Ward and Carty were aware that APA, the pilots' union, had received reports that some APFA members expressed to APA-represented pilots a desire to change their votes, as APA and TWU members had been able to do throughout the balloting. In fact, Ward thought a one-day extension insufficient, and he requested an extension of several days, which the Company refused. Because Ward consistently sought more time for APFA members to consider the proposed RPA, APFA's acceptance of American's offer for an extension, once finally extended, cannot be viewed as arbitrary or in bad faith. Indeed, no evidence indicates that, as

plaintiffs suggest, APFA's interest in the extension was based on anything other than its good faith assessment of its members' best interests.

As for APFA's decision to enter the LOA without membership ratification, Article XI § F of the APFA Constitution required ratification only if the Executive Committee determined that the alterations to the RPA embodied in the LOA were "substantial." But whether or not the alterations were substantial, APFA's decision to enter into it cannot be considered irrational or arbitrary in light of its reasonable fear that American would file for bankruptcy in the absence of agreement. Plaintiffs offer no evidence that APFA's decision to enter the LOA was "fraudulent, deceitful, or dishonest," *White*, 237 F.3d at 179, and thus no finding of bad faith is warranted.

Finally, in a conclusory manner, plaintiffs argue that APFA's conduct amounted to discrimination against its members in violation of its DFR. However, no evidence indicates that APFA's conduct was "unrelated to legitimate union objectives" or invidious. *Amalgamated*, 403 U.S. at 301. Plaintiffs have therefore failed to raise a triable issue of fact as to discrimination.

Plaintiffs raise several fact issues which they argue preclude summary judgment in APFA's favor. First, plaintiffs have produced evidence indicating that APFA's conduct did not comply with its constitution. With regard to ratification of the RPA, evidence indicates that APFA arranged for telephonic balloting to be conducted over a 15-day period, in accordance with the determination made by the BOD in its March

19, 2003 resolution. However, the constitution requires mail-in balloting over at least 30 days. *See above* Facts § III(A), n. 6. Also, evidence indicates that, although it was required to provide members with the complete changes embodied in the RPA either at the start of or prior to the balloting period, *see id.*, APFA did not do so. Finally, APFA entered the April 25, 2003 LOA without membership ratification. *See id.* However, "in light of both the facts and the legal climate that confronted [APFA] at the time the decision[s were] made," *O'Neill*, 499 U.S. at 78, as discussed above, no reasonable jury could find these actions "arbitrary, discriminatory, or in bad faith," *id.* at 67.

Second, plaintiffs submit that an issue of material fact exists with regard to whether APFA acted in bad faith or arbitrarily when its BOD passed the March 19, 2003 resolution interpreting the APFA constitution as providing for telephonic balloting over a 15-day period rather than mail-in balloting over 30 days. [16] Based on the undisputed fact that the Constitution Committee members stated they "never contemplated the potentially urgent need for ratification that can arise - as it apparently has now - in the context of concessionary bargaining," plaintiffs argue, "[a] jury could reasonably find . . . that the Union could not in good faith 'interpret' language to have a meaning that the drafters of the language state they never intended." However, the Constitution Committee stated that abiding by the 30-day provision in this context "would be inconsistent with the spirit of the Constitution." Under these circumstances, and on the undisputed facts, no reasonable jury could conclude that the BOD's interpretation was arbitrary or made in bad faith. Finally, notwithstanding that APFA chose not to heed

the Constitution Committee's advice to seek a declaratory judgment with regard to this interpretation of the constitution, *see above* Facts § III(A), no evidence indicates that APFA did so with "improper intent, purpose, or motive," *Spellacy*, 156 F.3d at 126, such that a finding of bad faith may be warranted. All evidence indicates that APFA's motive was to avoid an American bankruptcy and thereby preserve its members' interests.

Third, plaintiffs assert that the following evidence gives rise to an issue of material fact with regard to whether APFA acted in bad faith: (1) at the time APFA's financial advisor Mark King delivered his report on American's deteriorating financial condition, he was unaware that American would soon receive over $ 1 billion in aid from the government; and (2) American's cash balance would remain "fairly steady through June 30, right around the $ 1 billion mark." Jeffrey Campbell (former American Chief Financial Officer) Dep. 109. This evidence does not raise a triable issue of fact as to whether, at the time APFA relied on King's report, among other sources of information, it did so in bad faith.

Fourth, although there is a factual dispute as to what details APFA and Company officials knew about the vote tally, that dispute is not material as APFA and American do not dispute that the decision to extend the voting period for one day was made, in part, because APFA and the Company knew ratification would fail. Indeed, APFA's April 15, 2003 Resolution accepting the Company's offer of an extension explicitly states, "WHEREAS, the APFA membership has voted to reject the Company proposal by a very slim margin. . .

." Thus, APFA's knowledge with respect to the actual vote tally is irrelevant; the RPA's imminent failure was known. In any event, even if APFA had actual knowledge of the vote tally prior to agreeing to the extension, no evidence indicates that APFA's decision to extend the voting was made with "improper intent, purpose, or motive." *Spellacy*, 156 F.3d at 126. The court sees no basis for holding that APFA could not consider the likelihood ratification would fail in determining whether to agree to the extension.

Finally, plaintiffs proffer certain additional evidence which they assert creates a disputed issue of fact as to whether APFA acted arbitrarily or in bad faith, including evidence that (1) a significant number of APFA members experienced difficulties accessing the voting system; (2) some members were unable to vote because they had not received PIN numbers; (3) prior to accepting American's offer to extend the voting period and give members the opportunity to change their votes on April 15, 2003, APFA had, on April 10, 2003, considered and rejected the idea that members should be permitted to re-vote and/or change votes; and (4), after deciding to conduct a re-vote in the wake of American's disclosure of the SERP accounts, APFA reversed itself and entered the April 25, 2003 LOA. None of this evidence creates a triable issue of fact as to bad faith or arbitrariness.

In sum, evidence adduced by plaintiffs in opposition to APFA's motion for summary judgment fails to raise a triable issue of fact as to whether APFA's conduct was arbitrary, discriminatory, or in bad faith. Based on the record evidence, no reasonable jury could find that APFA's conduct fell below the *Vaca* standard.

Therefore, APFA's motion for summary judgment with regard to plaintiffs' DFR claims is granted.

D. Company Defendants' Motion For Summary Judgment

Because employer liability on a DFR theory is derivative of union liability, Company Defendants' motion for summary judgment with regard to plaintiffs' DFR claims is granted. *Simberlund v. Long Island R. Co.*, 421 F.2d 1219, 1228 (2d Cir. 1970).

IV. Plaintiffs' Claim for Breach of the Union Constitution

Plaintiffs have remaining a claim against APFA for "breach of the union constitution," which they contend is a breach of contract claim under New York law. APFA moves for summary judgment on this claim, construing it as a claim for breach of APFA's DFR. The allegations underlying plaintiffs' claim for "breach of the union constitution" are, in substance, identical to those in plaintiffs' DFR claims. This claim is therefore a "mere refinement" of the duty of fair representation and, as such, preempted by federal law. *See Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 507-08 (E.D.N.Y. 2004); *Marcoux v. Am. Airlines, Inc.*, 2006 U.S. Dist. LEXIS 14130, * 22 n. 4 (E.D.N.Y. Mar. 28, 2006). APFA's motion for summary judgment with regard to this claim is granted.

CONCLUSION

For the reasons set forth above, the motions for summary judgment filed by Company Defendants and

APFA are granted in their entirety. Plaintiffs' motion for summary judgment is denied, and their motion for class certification is dismissed as moot. The Clerk of Court is directed to enter judgment for the defendants.

SO ORDERED.
/s/ Nina Gershon

NINA GERSHON

United States District Judge

Dated: July 22, 2008
Brooklyn, New York

Footnotes

1 Under the RLA, disputes over the terms of new collective bargaining agreements, or "major disputes," *see Pan American World Airways, Inc. v. International Brotherhood of Teamsters, etc. ("Pan Am")*, 894 F.2d 36, 38 (2d Cir. 1990), are governed by the procedural requirements of RLA Section 6, 45 U.S.C. § 156. When a collective bargaining agreement is nearing expiration and one party seeks changes, that party must serve the other party with notice of proposed changes. The dispute is then subject to mediation under the auspices of the National Mediation Board. During mediation neither party may resort to any self-help measures, e.g., strike, work slow-down, etc. If mediation is unsuccessful and one or both of the parties refuse to submit the controversy to arbitration, the parties must then observe a thirty-day "cooling-off" period. *See* 45 U.S.C. § 155(1)(b); *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 481

U.S. 429, 445, 107 S. Ct. 1841, 95 L. Ed. 2d 381 (1987). Once the cooling-off period has expired without an agreement, the parties may then resort to economic force. *See Pan Am*, 894 F.2d at 38.

2 Although the CBA reached in 2001 was retroactive, becoming effective as of November 1, 1998, the court will refer to it as the "2001 CBA."

3 "An 'amendable' date typically provides that the agreement will continue through the amendable date and thereafter unless written notice of intended change is served in accordance with RLA Section 6 within a specified period prior to the amendable date." *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA*, 349 B.R. 338, 349 n. 4 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007).

4 The APFA Constitution, Art. III, § 3(A), provides:

> The Board of Directors is authorized and empowered to take any and all lawful action consistent with this Constitution to safeguard and protect the APFA, and the rights, privileges, duties and responsibilities of the officers, representatives and members of the APFA. The Board of Directors is authorized to interpret this Constitution and to establish, prescribe and adopt such other policies which may be consistent with this Constitution as required for the direction and management of the affairs of the APFA.

5 Later, APFA learned that American had not shared with APFA information regarding its bankruptcy-

protected retirement plan for senior officers. *See below* Facts § IV.

6 With regard to ratification, APFA Constitution Art. XI §1 provides:

> A. A proposed Collective Bargaining Agreement will be submitted to the affected membership for approval only after it has been accepted by a majority vote of the Negotiating Committee and presented to the Executive Committee.
>
> > (1) Should the Executive Committee reject a proposed agreement, the Negotiating Committee shall present the proposed agreement to the Board of Directors.
> >
> > (2) The Board of Directors may decide to submit the proposed agreement to the membership for approval.
>
> B. . . .
>
> C. The affected membership shall be given the complete changes to a Collective Bargaining Agreement prior to or at the start of the balloting period.
>
> D. A proposed Collective Bargaining Agreement shall be ratified by an affirmative vote by a majority of those active members in good standing covered by the applicable Agreement who return valid ballots. Members may vote only on those agreements which apply to their

respective airline(s), unless covered under a master agreement.

E. Balloting:

1. The sole issue to appear on the secret ballot shall be the ratification of the Collective Bargaining Agreement.

2. The time limit for the return of ratification ballots (the Balloting Date) shall be not less than thirty (30) days after the mailing of the ballots to the respective membership.

F. Any letters of agreement or side letters entered into between an employer and the APFA during or outside of the Collective Bargaining negotiations which alter the rates of pay, rules, or working conditions for covered Flight Attendant employees shall be subject to ratification by the Executive Committee. If the Executive Committee determines that the alteration is substantial, such letter of agreement or side letter shall be submitted for ratification to the membership covered by the applicable Agreement pursuant to the procedures outlined in this Article XI.

G. Upon ratification by the membership, a Collective Bargaining Agreement and/or letters of agreement shall be deemed binding.

7 Plaintiffs appear to challenge the admissibility of all factual assertions regarding what was or was not

discussed during the April 15, 2003 BOD meeting on the ground that APFA failed to record it and produce a transcript as required by the APFA Constitution. Factual assertions challenged include: (1) that during the teleconference, arguments were presented both for and against acceptance of the extension; (2) that board members discussed that the other two unions provided members with the option of changing votes throughout the balloting period; and (3) that at least one board member voiced concern that allowing members to change votes could be unfair to members who had discarded their PIN numbers after voting. Assuming APFA did have a duty to record these meetings and produce a transcript, its failure to do so is not a ground for inadmissibility, and plaintiffs offer no other challenge to this evidence.

8 Plaintiffs question whether flight attendants had the ability to exercise either the third or fourth option. However, the record evidence reveals nothing to indicate that they did not.

9 For a discussion of Section 6 of the RLA, *see above* n.1. Section 152 Seventh is one of several "status quo" provisions in the RLA which require parties to a CBA governed by the RLA to maintain, during the pendency of any dispute arising under their CBA, the working conditions in place prior to inception of the dispute. *See Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA*, 483 F.3d 160, 167 (2d Cir. 2007).

10 Section 152 Ninth provides, in pertinent part, that the National Mediation Board shall resolve "disputes as to who are the representatives of the employees designated and authorized in accordance with the

requirements of this Chapter" and to certify a designated union as bargaining agent. 45 U.S.C. § 152, Ninth. It provides further that "upon receipt of such certification the carrier shall treat with the *representative* so certified as the representative of the craft or class for the purposes of this Chapter." *Id.* (emphasis added). Section 152 Second provides that "all disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated* and authorized so to confer, . . ." 45 U.S.C. § 152, Second (emphasis added).

11 Company Defendants have treated the absence of an implied right of action as a "standing" issue. Plaintiffs in response have argued that they meet the standing requirements of Article III of the Constitution. The parties' approach is not to the point. The issue is whether the plaintiffs, as individual employees, are entitled, under the RLA, to bring suit. Also, that plaintiffs seek Rule 23 class certification does not alter the fact that they are not, even as a group, the certified representative contemplated by the RLA.

12 Plaintiffs' Amended Complaint does not contain a claim under RLA Section 152 First, but they nonetheless move for summary judgment on such a claim and the parties have briefed the claim. For the reasons in the text, even were plaintiffs granted leave to amend, the claim cannot survive.

13 [HN11] Unlike Section 152 Seventh, which is one of the RLA's "explicit status quo requirements," Section 152 First is an "implicit status quo requirement" because it may be invoked "either to ensure effective

compliance with the explicit status quo provisions . . . or to further justify an injunction premised primarily on those provisions." *Northwest Airlines*, 483 F.3d at 167 n.1,167-68 (citations omitted).

14 Although Count V of the Amended Complaint, labeled "Violation of the Railway Labor Act, 45 U.S.C. § 152 (Fourth)," refers to Section 152 Third as well, plaintiffs confirm in their motion papers that they assert no claim under Section 152 Third.

15 Under *IUFA*, this test is one of subject matter jurisdiction over postcertification claims by a union under Section 152 Fourth. *IUFA*, 789 F.2d at 142. Since *TWA*, which recognized subject matter jurisdiction over postcertification claims by unions, the issue has sometimes been treated as one of sufficiency of the claim. *See, e.g., Brotherhood of Locomotive Engineers v. Kansas City S. Ry.*, 26 F.3d 787, 795 (8th Cir. 1994). In either event, the test is the same.

16 Pursuant to the APFA Constitution, the Executive Committee is authorized to interpret the Constitution subject to the approval of the BOD. APFA Const. Art. III §3(L)(10), Art. XI § 1(F). "[T]he Board of Directors may override Executive Committee rejection of a proposed Collective Bargaining Agreement." Art. III § (3)(L)(10). "The Executive Committee shall act as the agent for and on behalf of the Voting Board of Directors, and shall interpret this Constitution, subject to the approval of the Board of Directors." Art. III § (4)(A). "An affirmative vote by a majority of those active members in good standing who return valid ballots shall be required for the passage of any proposed alteration, addition, deletion or amendment."

Art. III § 1(B). "[F]inal control of the APFA shall be vested in the membership." Art. III § (2)(A).

04 CV 1376 (NG)(KAM), 03 CV 4987 (NG)(KAM), 04 CV 634 (NG)(KAM)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

ANNE M. MARCOUX, JILL LINDSAY, KIRSTEN EVANS, CONSTANCE LaMATTINA, ELIZABETH LEE PRICE, JUDITH ALEXANDER, DEBORAH DEAN, CHRISTINA FORD, PATTI GENTRY, LaTONYA K. GILLMORE, JANET GOLD, DALE HAGAR, JULIE HORAN, LOUIS HORTER, CAROL JOHNSON, MOLLY KAIMAN, BEVERLEY KALKHOF, NANCYANNE KELLO, PATRICIA KENNEDY, JANET KIRBY, JOHN KLINE, DOTTIE LONG, KAREN RIVOIRA, LAURENCE E. SALOMON III, DANIEL SANTIAGO, REBECCA SMITH, and DEBORAH WHITTINGTON on Behalf of themselves and all others similarly situated (i.e., the "Class"); CONSTANCE LaMATTINA also on behalf of Subclass I, KIRSTEN EVANS, JILL LINDSAY and ELIZABETH LEE PRICE also on Behalf of Subclass II; DEBORAH WHITTINGTON also on Behalf of Subclass III, and JANET KIRBY also on Behalf of Subclass IV, Plaintiffs,

- against -

AMERICAN AIRLINES, INC., A.M.R. CORPORATION, ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, and JOHN WARD, as President of Association of Professional Flight Attendants, Defendants.

March 28, 2006, Decided

JUDGES: Nina Gershon, United States District Judge.

OPINION BY: Nina Gershon

OPINION

OPINION & ORDER

GERSHON, United States District Judge:

This action is one in a series of lawsuits arising out of defendant American Airlines Inc.'s ("American's") 2003 reorganization and the activities surrounding the negotiation and ratification of the subsequent concessionary agreements with American's employees' unions. Plaintiffs are "former and retired employees of American, members of the defendant union, the Association of Professional Flight Attendants ("APFA"), and current or former members of APFA's Bargaining Unit." Plaintiffs' First Amended Consolidated Class Action Complaint, ¶6 ("Amended Complaint"). They bring this action to set aside what they characterize as an "unlawful and unratified agreement between American Airlines and the labor union representing its flight attendants . . . ." Amended Complaint ¶1. Plaintiffs originally filed three related actions in this court, *Ford v. Association of Professional Flight Attendants, et al.* 03-CV-4987, *Lindsay v. Association of Professional Flight Attendants*, 04-CV-634, and *Marcoux v. American Airlines, Inc.*, 04-CV-1376. The actions were consolidated, and plaintiffs filed the Consolidated Class

Action Complaint on July 12, 2004, and amended it on November 30, 2004. Plaintiffs, who have not yet moved for class certification, identify four subclasses: (1) members of APFA who were entitled to vote on the ratification question, (2) members of APFA who voted in opposition to ratification, (3) members of the class who were furloughed, and (4) members of the class who have retired since the time of the alleged wrongdoing. Unless noted otherwise, plaintiffs' claims are brought on behalf of the class and all subclasses.

In addition to claims against American, the Amended Complaint asserts claims against American's parent company, AMR Corporation ("AMR") (jointly, the "Company Defendants"), as well as claims against APFA and its then-President, John Ward (jointly, the "Union Defendants"). In twenty-two Counts, plaintiffs allege violations of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the duty of fair representation ("DFR"), as well as violations of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), and state common law.

Company Defendants move to dismiss all of plaintiffs' state claims as preempted by federal law. Union Defendants move to dismiss some of plaintiffs' claims under the LMRDA. All defendants move to dismiss plaintiffs' claims alleging violations of RICO.

BACKGROUND

The allegations in the Amended Complaint, described below, are taken as true for the purposes of defendants' motions to dismiss. [1]

Prior to May 1, 2003, the terms and conditions of plaintiffs' employment were governed by a collective bargaining agreement that had been in effect since November 1, 1998 (the "1998 Agreement"). The 1998 Agreement was duly ratified by union members and was implemented in accordance with the RLA. The amendable date--the earliest time that either party could require the other to enter into negotiations to modify the agreement--for the 1998 Agreement was November 30, 2004. Notwithstanding this date, American approached APFA in or around December 2002 to begin to negotiate voluntary concessions from the flight attendants. American communicated to APFA that it had been experiencing a steady financial decline that was exacerbated by the terrorist attacks on September 11, 2001. Citing a fragile economy, problems in the airline industry, and a large drop in air travel, American asked APFA if it would voluntarily roll back flight attendant pay increases of three percent (3%) that were scheduled for 2003. Shortly thereafter, American announced that it would need "permanent" labor cost savings of $ 1.8 billion per year, of which APFA members were expected to contribute $ 340 million, through a collectively bargained mid-term agreement, called the Restructuring Participation Agreement ("RPA"). American further represented that, to avoid bankruptcy--which carried an additional loss of $ 130 million in cost savings and the furlough of 2,500 more flight attendants than originally contemplated in the initial spending cuts--APFA would need to enter into the RPA with American by March

31, 2003. This deadline was later extended to April 15, 2003.

APFA's constitution requires collective bargaining agreements to be ratified by the membership. The Negotiating Committee presents the proposed agreement to the Executive Committee. If the Executive Committee accepts the agreement, it is presented to the membership for ratification. However, if the Executive Committee rejects the proposed agreement, the Negotiating Committee may present it to the Board of Directors, which has the power to override the Executive Committee's rejection and submit the proposed agreement to the membership for approval. In either event, the membership is entitled to take at least 30 days prior to voting to consider the agreement. The APFA constitution also provides for secret, mail-in, paper balloting and requires that the membership receive the complete changes to any proposed collective bargaining agreement prior to or at the start of the balloting period. An agreement is ratified and thus binding upon the membership once a majority of members in good standing vote in favor of ratification.

To meet American's April 15, 2003 deadline, APFA's Board of Directors passed a resolution on March 19, 2003, suspending the 30-day consideration period prior to the commencement of balloting and permitting the use of electronic ballots. On March 31, 2003, APFA's Negotiating Committee reached agreement with American on the final terms of the RPA, and the Executive Committee recommended presenting it to the APFA membership for ratification. The balloting

was scheduled to begin the first week of April, and end on April 15, 2003.

Throughout the balloting period, APFA maintained a hotline that broadcast various messages purporting to provide updated information to the membership. Plaintiffs allege that these recorded messages served only to present false and misleading information to the APFA members regarding American's economic forecast and to pressure APFA members into ratifying the RPA by stating, among other things, that if the membership rejected the proposal, negotiations would be discontinued. Plaintiffs also suggest that APFA misrepresented its position regarding the members' ability to change their votes by stating that "[APFA] determined that it would be most in keeping with APFA's normal, prescribed voting procedures to not allow a member to change their vote." In fact, as discussed below, APFA members were permitted to change their votes during the one-day extension of voting.

Plaintiffs also allege that defendants engaged in additional activities to induce APFA members to ratify the RPA. Plaintiffs assert that defendants knew that the membership had voted to reject the RPA on April 14th and sought to exert "undue pressure and scare tactics" to get individuals who had not voted to cast ballots in favor of the RPA before the deadline. For example, defendants, among other things, called flight attendants and suggested that, if the RPA were rejected, American would declare bankruptcy; and they held "impromptu" meetings at airports to garner support for the RPA. Plaintiffs assert that these pressure tactics were targeted specifically to those

flight attendants that American and APFA knew had not yet voted. Despite these efforts, on April 15, 2003, the APFA membership voted to reject the RPA, with the final tally being 9,842 against ratifying the RPA, and 9,309 for ratifying the RPA. Subsequently, American and APFA agreed to extend the voting until April 16, 2003.

During the additional day of voting, APFA allowed members who had previously voted to change their votes. Plaintiffs assert that the second round of voting was tainted by illegal electioneering practices which were initiated by American and willfully ignored by APFA. These practices included American and APFA, both subtly and overtly, creating a "frenzy" and "sheer panic" among APFA members by suggesting that American would declare bankruptcy if the RPA were rejected. Defendants' objectionable conduct included placing "pop-up" notices supporting ratification on the flight services' website and providing money or a "minor gratuity" to flight attendants who had voted "No" to ratification in exchange for their changing their votes to "Yes." As a result of these efforts, 1,262 votes were cast, and the membership ratified the RPA, with the final tally being 10,761 votes in favor of ratifying the RPA, and 9,652 votes opposing ratification.

On or around April 17, 2003, it was revealed that American had, despite its precarious financial position, established a Supplemental Executive Retirement Program for its top 45 executives and cash retention bonuses for its top six executives. Upon learning of the bonus programs, defendant John Ward immediately sent a letter to American demanding that the APFA membership be given a "fresh opportunity to vote on

the proposed terms of the restructuring agreement in an untainted environment." Shortly thereafter, Ward sent another letter asserting that American's "material breach of its obligation to disclose all relevant information" necessitated a re-balloting. APFA's Board of Directors formalized this request by passing a resolution on April 22, 2003, directing APFA's National Ballot Committee to conduct a re-ballot.

On or around April 23, 2003, APFA and American began negotiating additional terms to the RPA. The resulting provisions shortened the life of the RPA by eight months, made the collective bargaining agreement amendable in three years, allowed pay increases in the event that American became financially viable and granted the right to substitute another concession in exchange for reinstating a previously-surrendered concession relating to the calculation of flight attendants' salaries. These additional terms, which John Ward maintained were still a "tremendous sacrifice" on APFA's behalf, were added to the RPA on April 25, 2003 by way of a letter agreement which purported to "resolve all disputes" concerning the negotiation, ratification, and effectiveness of the RPA.

The Amended Complaint contains other allegations directed expressly to the RICO claims. These will be addressed below.

DISCUSSION

All defendants having answered, they move, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings dismissing certain claims in the Amended Complaint. A motion for judgment on

the pleadings under Rule 12(c) is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). That is, the motion should be granted only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d. Cir. 1998). Plaintiffs' factual allegations must be accepted as true, *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), and the court must draw all inferences in favor of plaintiffs. *Thomas v. City of New York*, 143 F.3d. 31, 37 (2d Cir. 1998).

A. State Law Claims

In addition to their claims under the RLA and the DFR, plaintiffs, relying on the same factual allegations which form the bases of their RLA and DFR claims, assert nine state common law claims. American or the Company Defendants move to dismiss the eight claims directed against them. [2] Count Ten alleges that American breached individual employer contracts with its employees by interfering with their rights under RLA Section 2, Third and Fourth, to designate and be represented by bargaining representatives of their choice. *See* 45 U.S.C. § 152, Third and Fourth. Counts Twelve and Sixteen allege that the Company Defendants intentionally interfered with contractual relations between APFA and its members by causing APFA to breach certain provisions of its constitution and bylaws relating to balloting and electioneering practices. Counts Seventeen and Eighteen assert breach of implied contract claims against the Company Defendants based on an implied duty not to interfere with internal union balloting. Counts Nineteen and

Twenty assert unjust enrichment claims against the Company Defendants for allegedly wrongful conduct in obtaining APFA members' approval of the RPA. Finally, Count Twenty alleges that the Company Defendants engaged in fraud and misrepresentation during the RPA negotiations by falsely communicating that American was on the verge of bankruptcy and by failing to disclose material facts relating to its financial state. Like plaintiffs' claims under the RLA and the DFR, all of these state law claims arise out of occurrences during the negotiation and ratification of the collectively bargained RPA. The Company Defendants argue that they are therefore preempted by federal law.

The RLA provides a comprehensive federal regulatory scheme for the resolution of disputes in the rail and air transportation industries. Specifically, the RLA governs the process of negotiation of "agreements concerning rates of pay, rules and working conditions" between carriers and their employees. 45 U.S.C. §§ 152, 156. It protects the right of employees to designate the bargaining representative of their choosing and imposes obligations on carriers and unions with respect to the negotiation of agreements and the settlement of disputes. *See* 45 U.S.C. § 152. Under the RLA, disputes between labor and management are categorized as either "major" or "minor". *See Consolidated Rail Corp. v. Railway Labor Exec. Ass'n., et al.*, 491 U.S. 299, 302, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("*Conrail*").

"Major" disputes seek to create contractual rights; they involve disputes arising out of the formation of collective bargaining agreements or efforts to secure such agreements. *See id.*; 45 U.S.C. §§ 152, Seventh and

156. [3] This category of disputes looks to the "acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945). Major disputes arise only when there is no existing collective bargaining agreement in place or where a party seeks to change the terms of an existing agreement, in effect, formally creating a new agreement. In the event of a major dispute, the RLA requires the parties to undergo a lengthy process of bargaining and mediation. *See Conrail*, 491 U.S. at 302-3. If the bargaining and mediation fails, the parties are encouraged to submit to arbitration. *Id.*

The parties to "minor" disputes, on the other hand, seek to enforce contractual rights arising out of an existing collective bargaining agreement. *See Conrail*, 491 U.S. at 303. Labor disputes are deemed minor disputes if they arise or grow out of "grievances or out of the interpretation and application of agreements concerning rates of pay, rules or working conditions." *Id.; see also Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246, 252-53, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (*"Hawaiian Airlines"*). Under the RLA, parties to minor disputes are required to submit to "compulsory and binding arbitration before the National Railroad Adjustment Board" or "before an adjustment board established by the employer and the unions representing the employees." *See Conrail*, 491 U.S. at 303-4. The adjustment boards have exclusive jurisdiction over minor disputes, and judicial review of any arbitral decision is limited. *See id.* at 304.

Here, plaintiffs' state law claims attack Company Defendants' conduct while negotiating and pursuing

ratification of the collectively bargained RPA. While couched in state law terminology, all of these claims rely on the identical factual allegations supporting the RLA claims and therefore are "major" disputes under the RLA. Under the preemption doctrine set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), state law claims are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by federal labor law. *See Belknap v. Hale*, 463 U.S. 491, 498, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983). Although *Garmon* preemption first arose in the context of the National Labor Relations Act ("NLRA"), and *Garmon* itself concerned the primary jurisdiction of the National Labor Relations Board ("NLRB"), the *Garmon* preemption doctrine has been extended to conduct governed by the RLA. *See Bhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 369, 383-84, 89 S. Ct. 1109, 22 L. Ed. 2d 344 & n.19 (applying *Garmon* preemption principles while noting that "there is . . . no administrative agency equivalent to the NLRB with jurisdiction over railway labor disputes"). Thus, state claims that attempt to regulate conduct protected or prohibited by the RLA are preempted. In the RLA context, as in cases arising under Section 301 of the Labor Management Relations Act, 1947, ("LMRA"), as amended, 29 U.S.C. §§ 141 *et seq.*, preemption is driven by the need for uniform federal regulation of labor-management relations. *See Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir. 1985)(finding that "the risk of state interference with the effective administration of national labor policy is present [in the RLA context] even though the exclusive jurisdiction of the arbitrator is not at issue"); *cf. Allis-Chalmers Corp. v. Lueck*, 471

U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985) (noting, in a Section 301 case, that interests in interpretive uniformity and predictability require that labor-contract disputes be resolved by reference to federal law).

In this case, there is no dispute that American owed plaintiffs certain statutory duties under the RLA and that APFA had a duty of fair representation with respect to plaintiffs. [4] There is also no dispute that, under the RLA, hybrid DFR claims may be asserted against an employer and that such claims are governed by federal law. *See Czosek v. O'Mara*, 397 U.S. 25, 29-30, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). Counts One through Nine in the Amended Complaint, which defendants do not move to dismiss, allege RLA and DFR or hybrid DFR violations based on all defendants' conduct during the negotiation for and ratification of the RPA. For example, plaintiffs challenge defendants' actions in "extending the balloting to April 16, 2003," "denying the flight attendants the opportunity to cast their ballots in a calm atmosphere," "deliberately creating a firestorm of fear and frenzy," and "failing to assure the integrity of the balloting process and the accuracy of any tallies." Plaintiffs' state law claims assert common law theories based on identical conduct.

Garmon carved out two narrow exceptions to the preemption doctrine which recognize that major disputes are not preempted where state regulation of conduct "deeply rooted in local feeling and responsibility" or matters of "merely peripheral concern" to federal labor relations law are at stake. *Garmon*, 359 U.S. at 243-44. These exceptions highlight the court's responsibility "to determine the scope of the

general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25 et al.*, 430 U.S. 290, 297, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977). Here, none of the challenged state law claims falls within either exception. Rather, each goes to the heart of the federal interest in ensuring the fair and orderly negotiation of working conditions by carriers and employees. The interests asserted by the plaintiffs are precisely those protected by federal labor law, not interests "deeply rooted in local feeling and responsibility." *See Bensel v. Allied Pilots Ass'n.*, 387 F.3d 298, 321-22 (3d Cir. 2004). "Far from being of only 'peripheral concern' to federal labor law, plaintiffs' state law claims strike at the core of conduct and relationships governed" by the RLA. *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 506 (E.D.N.Y. 2003).

Plaintiffs attempt to avoid preemption as to some of their state law claims by arguing that they do not arise from the effort to achieve a collectively bargained agreement, but rather arise from the breach of separate, individual contracts. Plaintiffs claim the existence of two types of independent contractual obligations. Count Twelve--which is alleged only on behalf of members of the class who were entitled to vote on ratification--and Count Sixteen assert that the Company Defendants interfered with the plaintiffs' contractual relations with APFA as set forth in the union's constitution and bylaws. Counts Ten, Seventeen and Eighteen rely on the RLA itself. In Count Ten, plaintiffs argue that, since Section 2, Eighth of the RLA provides that the Third, Fourth, and Fifth paragraphs

of Section 2, are part of the contract of employment between the carrier and each employee, "to the extent that American has violated Section 2, Third and Fourth of the RLA, it has also violated its contracts of employment." [5] Counts Seventeen and Eighteen allege breaches of implied contracts between the Company Defendants and the flight attendants not to interfere with union balloting procedures. On oral argument, plaintiffs acknowledged that these implied contracts also arise solely from obligations imposed on the carrier under the RLA.

First, as discussed earlier, plaintiffs are alleging major disputes as all of these claims deal explicitly with alleged misconduct by American or the Company Defendants during the negotiation and ratification of the RPA, and these claims are in essence no different from their RLA and hybrid DFR claims. [6] Second, plaintiffs' allegations do not amount to claims of individualized contracts protected by state law. The rights set forth in the RLA, which plaintiffs allege create implied individual contracts, are governed by federal law and are rights that employees have during the course of their effort to obtain a collectively bargained agreement. Such rights are wholly within the purview of the RLA, and thus any state law claims alleging violations of those rights are assuredly preempted.

Plaintiffs' reliance on *Hawaiian Airlines* to argue that these so-called individual claims should be viewed as not subject to preemption obfuscates the difference between federal preemption over major disputes under the RLA, which is at issue here, and federal preemption of disputes regarding the interpretation of collectively

bargained agreements, which is not at issue, but was the subject of *Hawaiian Airlines*. The defendant in *Hawaiian Airlines* argued that the plaintiff's claim under a state whistleblower statute could be heard only by the RLA's arbitral boards and thus was preempted. The Supreme Court disagreed on the grounds that the only source of the claimed rights was state law and not the collectively bargained agreement and that interpretation of the collectively bargained agreement was not required. In essence, the state law claims were not minor disputes and therefore could proceed in state court. Nothing in the Supreme Court's decision suggests that major disputes regarding the negotiation and ratification of collectively bargained agreements can be heard as state law claims.[7]

In sum, the eight state law claims against American or the Company Defendants are dismissed as preempted by federal law.

B. LMRDA Claims

Counts Thirteen, Fourteen and Fifteen assert claims under Section 411 of the LMRDA, 29 U.S.C. §§ 411(a)(1), which provides that:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Defendants seek dismissal of Counts Fourteen and Fifteen, and parts of Count Thirteen, on the ground that the court lacks jurisdiction to hear the claims.

In *Members for a Better Union v. Bevona*, 152 F.3d 58 (2d. Cir. 1998), the Court of Appeals for the Second Circuit held that there is no jurisdiction unless the "specific allegations in the complaint reflect an infringement of rights protected under Title I of the LMRDA." In *Bevona*, union members sought to enjoin certain voting procedures mandated by the union leadership regarding a vote on proposed amendments to the union's constitution. Specifically, plaintiffs charged that the union wrongfully refused to publish the proposed amendments in the union newspaper, scheduled the vote at times that did not accommodate all employment shifts, and published the executive committee's negative recommendation in the union newspaper without giving plaintiffs the opportunity to present an opposing view. The Court found that, although the union's actions may have dissuaded some members from voting, there was no discriminatory denial because the "same detriments applied equally to the class." *Id.* at 65. Under *Bevona*, then, mere allegations of unfairness do not state a claim under Section 411(a)(1). Rather, to be within the court's jurisdiction under that Section, plaintiffs' claims must allege that APFA granted rights to some of its members, but denied those same rights to others, in order to carry out a discriminatory goal.

Plaintiffs have satisfied the jurisdictional threshold with respect to the claim alleged in Count Thirteen. [8] Defendants do not dispute that the language of paragraph 312 of Count Thirteen, which alleges that

"the Union violated 29 U.S.C. § 411 by permitting members to change their votes from 'No' to 'Yes,' but not vice versa," meets the *Bevona* test. Defendants recognize that this allegation meets the jurisdictional prerequisite because it pleads that the union favored certain of its members (those voting in opposition to ratification), by granting them the right to change their vote to "yes," but denied that same right to those who had voted in favor of ratification and wanted to change their votes to "no." In essence, this alleged denial of voting rights sought to ensure ratification of the RPA, by discriminating against those employees in opposition to ratification.

Defendants nonetheless ask the court to treat the allegations of Count Thirteen as three separate claims in order to obtain dismissal of the other two "claims," namely, paragraph 310, which alleges that APFA "violated 29 U.S.C. § 411 by reopening a vote that was already officially closed so that there could be no extended voting," and paragraph 311 which alleges that APFA permitted members to change their votes during the extension period. Defendants' application to dismiss individual sentences within Count Thirteen is denied. A claim is not to be dissected sentence by sentence. It is enough, at this stage of the litigation, that Count Thirteen, as noted above, states a claim under the LMRDA.

Count Fourteen alleges, on behalf of members of the class who voted in opposition to ratification, that the Union Defendants improperly used the National Balloting Committee's resources to distribute only information in support of ratification, and thereby denied those opposed to ratification the same privileges

enjoyed by the "yes" voters. The Second Circuit rejected a similar argument in *Bevona*--where the union had refused to publish opposing views in the union newspaper--on the ground that, even though the information provided to the membership was one-sided, all of the membership received it. Therefore, the court held, no individual was granted rights or information that was discriminatorily denied to others. *See Bevona*, 152 F.3d at 58.

Finally, Count Fifteen alleges, on behalf of all members entitled to vote on the ratification question, that APFA wrongfully dispensed with the membership's vote by "substituting" for it the Board of Directors' vote, thereby effectively denying to the union members their rights and privileges as voting members of the union. Plaintiffs urge the court to consider this claim in light of *Smith v. Bowers*, 337 F.Supp.2d 576 (S.D.N.Y. 2004). There, the ballots of three local unions were disqualified after the locals allowed their members to vote after the time that was designated by union leadership to end balloting. Although the votes of these locals were originally counted in the national totals, the national leadership disqualified the votes. The Court held that, under *Bevona*, the jurisdictional threshold was met because plaintiffs undisputedly alleged disparate treatment by the national union leadership, in that the votes of certain of the unions' members (those who voted before the end of balloting) were counted, while others (those of the three locals) were not. *Id.* at 588. In contrast, here, no such disparate treatment within the voting class is alleged. Rather, since the alleged denial of voting rights extended across the entire membership, regardless of whether members voted for or against ratification of the RPA, no members were

granted any greater or lesser privileges than others. *See Local Unions 20. v. United Bhd. of Carpenters & Joiners of Am.*, 223 F. Supp. 2d 491, 498 (S.D.N.Y. 2002).

In sum, the court has jurisdiction over Count Thirteen, but not over Counts Fourteen and Fifteen, and Counts Fourteen and Fifteen are dismissed.

C. RICO Claims

In Count Twenty-two, plaintiffs assert as to all defendants both a substantive violation of 18 U.S.C. § 1962(c) and a conspiracy, under 18 U.S.C. § 1962(d), to violate Section 1962(c). 18 U.S.C. § 1962(c) makes it unlawful, in relevant part,

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4). Plaintiffs must allege a pattern of "racketeering activity" consisting of "at least two predicate acts . . . which amount to or pose a threat of continued criminal activity." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d. Cir. 2004). "Racketeering activity" is defined to include "any act which is indictable under" 18 U.S.C. § 1343 (wire fraud), 18

U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1951 (the Hobbs Act), 18 U.S.C. § 1952 (the Travel Act), and 29 U.S.C. § 186 (restrictions on payments and loans to labor organizations). *See* 18 U.S.C. 1961(1)(B). Under the mail and wire fraud statutes, "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," which involves use of the mails or wire is indictable. *See* 18 U.S.C. §§ 1341, 1343. Plaintiffs here rely upon allegations of thousands of acts said to violate the aforementioned statutes. Defendants principally argue that, despite the number of alleged predicate acts, plaintiffs fail to plead the required pattern of racketeering.

In the Amended Complaint, plaintiffs greatly expand their original RICO claims. They allege that, beginning as early as December of 2002 and continuing through at least September of 2004, American and APFA formed an association-in-fact for the dual purposes of (1) devising and carrying out a scheme to fraudulently induce American's flight attendants to enter into the RPA and (2) devising and implementing the strategy allowing the APFA Board of Directors to substitute its own approval of the RPA for the decision of the APFA membership. Plaintiffs categorize defendants' alleged wrongful activity in furtherance of these plans into four "implementing schemes." As with the facts discussed above, any additional allegations described below are taken as true for purposes of the pending motions.

First Implementing Scheme

In mid-February 2003, American sought to scare APFA members into voluntarily relinquishing current wages

and benefits packages by falsely asserting that American was suffering from a financial crisis arising, in part, from labor costs. Specifically, plaintiffs allege, APFA endorsed American's false statements, even though they had access to American's books and records, which should have indicated that American's economic outlook was more positive than previously communicated. Plaintiffs also allege that APFA reiterated American's false representations to the membership, with knowledge that the representations were false. Each telephonic message, union publication, and/or American publication that contained the allegedly false representations, and was communicated via mail or wire to the APFA members, is alleged as a separate predicate act under RICO.

Second Implementing Scheme

From April 15 to April 16, 2003, American and APFA allegedly used "coercion, vote rigging and, ultimately diktat or decree" to aggressively pursue votes in favor of ratification during the one-day extension of voting on the RPA ratification question. Specifically, plaintiffs assert that American and APFA formed "get-out-the-vote" squads to aggressively pressure members either to vote in favor of ratification or, if they had already voted "no," to change their votes to "yes." Plaintiffs also allege that American and APFA had insider knowledge as to whether and how members had voted on the ratification question. Plaintiffs contend that this alleged coercion and extortion violated the Hobbs and Travel Acts and, therefore, are predicate acts under RICO. Plaintiffs also allege that American, in effect, paid certain flight attendants a "gratuity" to vote, or arranged or paid for them to call in their vote to the

American Arbitration Association, in violation of 29 U.S.C. § 186, with each payment constituting a predicate act under RICO.

Defendants are also charged with meeting, via telephone conference, between April 22 and April 23 of 2003, to devise and implement the strategy of causing APFA's Board of Directors to usurp the flight attendants' power to hold another vote on the ratification question. Plaintiffs claim that, when John Ward executed the letter agreement between American and APFA, the defendants effectively eliminated the members' opportunity to hold another vote regarding the proposed RPA. Plaintiffs allege that defendants violated the mail and wire fraud statutes by posting the Board of Director's resolution (which was in furtherance of the substitution scheme) on APFA's website and subsequently mailing it to the APFA membership.

Third Implementing Scheme

Defendants allegedly sought to continue the life of the RPA by ensuring that individuals associated with the "Ward Regime" remained in office. To this end, APFA and John Ward worked together to engage in deception and vote manipulation to re-elect Ward as President in the APFA election scheduled to occur on January 29, 2004. After a runoff between the final two candidates, John Ward and Tommie Hutto-Blake, APFA announced that Ward had won the election by five votes. However, in approximately mid-August of 2004, after investigating and reinstating certain disqualified votes, the Department of Labor determined that Tommie Hutto-Blake had actually won the January 29,

2004 election. APFA subsequently installed her as President. Plaintiffs allege that APFA "manufactured a majority" and, with knowledge of the falsity of the results, wrongfully announced that John Ward had won on January 29, 2004. Plaintiffs contend that each time the erroneous results were published, or either telephonically or electronically disseminated, defendants violated the mail and wire fraud statutes.

Fourth Implementing Scheme

In May of 2004, allegedly in furtherance of its plans to "sanction practices in which it was already engaged without constitutional authority" and to "further the goals of the criminal enterprise," the Union Defendants proposed several amendments to the APFA constitution to its membership. The amendments sought to: (1) allow union leadership to appoint members of the Negotiating Committee; (2) grant the Board of Directors wider discretion in deciding voting procedures; (3) codify the "voter eligibility" rule that had been used in determining eligibility in the January 29, 2004 National Officer election; (4) alter the number and composition of the Balloting Committee, and (5) limit the membership's ability to initiate the process of proposing amendments to the APFA constitution. On August 11, 2004, APFA's membership voted the amendments down. Plaintiffs claim that, although the proposed amendments were not in and of themselves criminal, they were related to pursuing the goals of the criminal enterprise. Therefore, each mailing in furtherance of the proposed amendments constituted an act of mail fraud under 18 U.S.C. § 1341.

Pattern of Racketeering Activity

Plaintiffs have failed to plead facts establishing a RICO pattern. Although a pattern requires only a minimum of two predicate acts, plaintiffs must also show that the predicates are (1) related and that (2) they amount to or pose a threat of continuing criminal activity. *See Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 97 (2d Cir. 1997); *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir. 1989), cert. denied, 493 U.S. 811, 110 S. Ct. 56, 107 L. Ed. 2d 24 (1989). Predicate acts are related if they "have the same or similar purposes, results, participants, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics, and are not isolated events." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Continuity is established by facts demonstrating either an "open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." *See GICC Capital Corp. v. Tech.Fin. Group, Inc.*, 67 F.3d 463, 466 (2d Cir. 1995).

1. Relatedness

To begin with, plaintiffs' First, Second and Third Implementing Schemes relate to the single overarching goal of inducing the flight attendants to enter into the RPA, and ensuring the continuation of the RPA. Plaintiffs' characterization of the facts as setting forth three separate schemes is artificial. *See Schlaifer Nance & Co.*, 119 F. 3d at 98 ("Courts must take care to ensure that plaintiff is not artificially fragmenting a singular act into multiple acts simply to invoke RICO.").

The Fourth scheme, which pertains to the internal governance of the Union, alleges no conduct by the Company Defendants, is unrelated to the goal of defrauding the flight attendants into ratifying the RPA and cannot be fairly viewed as a means of continuing the criminal enterprise. It therefore is not properly included in the RICO pattern. *See Schlaifer Nance & Co.*, 119 F.3d at 97 (schemes unrelated to pattern of racketeering activity where goals are unrelated to the underlying enterprise). Therefore, the Fourth scheme--and its alleged underlying predicate acts-- are not properly considered in analyzing whether the continuity requirement has been met.

2. Continuity

Treating the First through Third implementing schemes as related, plaintiffs do not meet RICO's continuity requirements. "Closed-ended" continuity is demonstrated by a "series of related predicates extending over a substantial period of time" *Cofacredit S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 242 (2d Cir. 1999). The Second Circuit has indicated that a minimum of two years is required to show "a substantial period of time." *Id.* ("Since the Supreme Court decided *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), this Court has never held a period of less than two years to constitute 'a substantial period of time'"). Thus, in this Circuit, closed-ended continuity is primarily a temporal concept, even though courts may weigh such other factors as "the number and variety of acts, the number of participants, the number of victims and the presence of separate schemes." *See GICC Capital Corp.*, 67 F.3d at 467.

The First through Third schemes extended from mid-February of 2003 through January 29, 2004, indicating that the criminal enterprise continued for approximately eleven and a half months. (Even if the scheme could be treated as beginning in December of 2002 and continuing until action by the Department of Labor, it lasted only until mid-August of 2004, or a period of twenty months). [9] Indeed, as to the Company Defendants, who are not alleged to have participated in the Third or Fourth schemes, the enterprise lasted only from mid-February of 2003 through April 25, 2003. This falls far short of the Second Circuit's two-year minimum requirement. Plaintiffs do not dispute that their allegations do not meet the two-year requirement, but argue that the existence of multiple schemes and thousands of predicate acts of mail and wire fraud overcome this deficit. However, as noted above, plaintiffs are artificially fragmenting what is essentially one alleged criminal purpose--inducing the flight attendants to ratify the RPA--into multiple schemes. Thus, without more, merely alleging a large number of mailings and calls is insufficient to meet plaintiffs' burden. Plaintiffs' speculative assertion that discovery may establish that defendants' first predicate act occurred at least three months earlier than alleged does not overcome the deficiency of the Amended Complaint.

Plaintiffs alternatively argue that they have sufficiently pled an open-ended pattern of racketeering activity. Even if the court were to consider all four schemes to be related, plaintiffs offer no facts indicating that a threat of continuing criminal activity exists beyond the period during which the predicate acts were performed. *See De Falco v. Bernas*, 244 F.3d 286, 323 (2d Cir. 2001).

Open-ended continuity requires an assessment of "the nature of the RICO enterprise, and of the predicate acts." *Cofacredit S.A.*, 187 F.3d at 242. Where, as here, defendants are operating legitimate businesses, plaintiffs are required to plead facts indicating that there existed the threat of continued criminal activity in furtherance of defendants' plans. *See GICC Capital Corp.*, 67 F.3d 463 at 466. For example, in *Cosmos Forms v. Guardian Life Ins. Co. of Am.*, 113 F.3d 308 (2d Cir. 1997), defendants, who were salespersons in two separate companies, engaged in a scheme of inflating prices on paper orders for personal profit. The Court of Appeals found that plaintiffs met the open-ended continuity requirement because defendants had committed the unlawful acts regularly for fifteen months and only stopped because they had been caught by their respective companies. In contrast, plaintiffs here have not demonstrated such an ongoing threat of criminal activity. The alleged criminal goal, the fraudulent ratification of the RPA, was accomplished on April 25, 2003. Ward's challenger assumed office as President of APFA in mid-August of 2004, and the proposed constitutional amendments were voted down by the APFA membership on August 11, 2004. *Id.* (finding that even if alleged acts were presumed to be true, it was clear that the scheme was "inherently terminable" and thus could not have continued). [10]

RICO Conspiracy

Finally, plaintiffs claim that all defendants conspired to violate the substantive provisions of 18 U.S.C. 1962(c). Since plaintiffs' substantive RICO claim fails for lack of sufficient pattern allegations, the RICO conspiracy

claim cannot survive. *See Cofacredit, S.A.*, 187 F.3d 229, 245 (2d Cir. 1999).

CONCLUSION

For the reasons discussed above, the Company Defendants' motion to dismiss Counts Ten, Twelve, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty one and Twenty-two is granted. The Union Defendants' motion to dismiss is granted as to Counts Fourteen, Fifteen and Twenty-two, and denied as to Count Thirteen.

SO ORDERED.

Nina Gershon

United States District Judge

Dated: March 28, 2006
Brooklyn, New York

1 Plaintiffs have not contested the Company Defendants having attached various documents, such as the Restructuring Participation Agreement and the union's constitution, which are referred to in the Amended Complaint, to their motion. The attachment of such documents does not convert this motion to one for summary judgment. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). In any event, it was unnecessary to rely on anything other than the Amended Complaint itself in resolving the motions.

2 Count Eleven, brought on behalf of members of the class who were entitled to vote on ratification, alleges

that APFA breached a contract (the APFA constitution) with its members by engaging in unlawful balloting and negotiating activity. APFA has not moved to dismiss this claim.

3 Section 2, Seventh states that no carrier "shall change the rates of pay, rules, or working conditions of its employees...except in the manner prescribed in such agreements," or through the mediation procedures established in Section 6.

4 The duty of fair representation, although not an explicit statutory requirement, has been fashioned judicially as a corollary to "the exclusive agent's statutory authority to represent all members of a designated unit" and requires the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74-77, 111 S. Ct. 1127, 113 L. Ed. 2d 51; *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). Because federal labor law defines the scope of the duty of fair representation a union owes to its members, state law claims that are "mere refinements" of the duty of fair representation also are preempted. *See Peterson*, 759 F.2d at 1170.

5 Section 2, Third provides, in relevant part, that "representatives ... shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in

its choice of representatives . . . ." 45 U.S.C. § 152, Third.

Section 2, Fourth provides, in relevant part, that "employees shall have the right to organize and bargain collectively through representatives of their own choosing ... no carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice . . . ." 45 U.S.C. § 152, Fourth.

6 Counts Twelve and Sixteen assert in effect hybrid RLA/DFR claims against American and, just like the other state law claims against the Company Defendants, are predicated on conduct surrounding the negotiation and ratification of the RPA. The hybrid RLA/DFR claims against American are, therefore, major disputes that are preempted under *Garmon*. *See Cooper v. TWA Airlines, LLC*, 274 F.Supp.2d 231, 248-49 (E.D.N.Y. 2003); *Cooper v. TWA Airlines, LLC*, 2005 U.S. Dist. LEXIS 41007, 2005 WL 3863435 (E.D.N.Y. July 18, 2005).

7 Plaintiffs' reliance on *Sullivan v. American Airlines*, 424 F.3d 267 (2d Cir. 2005), is also misplaced. There, the Court of Appeals for the Second Circuit recognized that, under *Hawaiian Airlines*, state law claims that are disguised minor disputes are preempted by the RLA. *Sullivan*, 424 F.3d at 273. *Sullivan* held, however, that, even where state law claims qualify as minor disputes under the RLA, and even though a defendant can assert preemption in the state court as a defense, the misnamed jurisdictional doctrine of "complete preemption" does not create federal

jurisdiction authorizing removal of the action from state court to federal court. *Sullivan* provides no support for plaintiffs' position here.

8 Count Thirteen is alleged only on behalf of members of the class who cast ballots in opposition to ratification.

9 Even if the Fourth Implementing Scheme were included, plaintiffs allege an enterprise lasting either eighteen months (from mid-February 2003 through August 11, 2004), or at most, twenty months (from-mid December 2002 through August 11, 2004). In either event, plaintiffs do not reach the two-year minimum.

10 Defendants assert various other arguments in support of dismissing the RICO claims. Because plaintiffs have failed to plead a pattern of racketeering activity, it is unnecessary to separately consider any of these arguments.

Filed 2/2/04
CV 03-8305 ABC (PLAx)

UNITED STATES DISTRICT COURT CENTRAL DISTRICT of CALIFORNIA WESTERN DIVISION
JILL LINDSAY,
Plaintiff,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, et al.,
Defendants.

ORDER RE: (1) PLAINTIFF'S MOTION TO REMAND ACTION To STATE COURT and (2) DEFENDANTS' MOTION TO CHANGE VENUE

The instant motions to remand[1] and to change venue came on for hearing on February 2, 2004. Having carefully considered the materials submitted by the parties, argument of counsel and the case file, and for the reasons set forth below, Plaintiff's Motion to Remand is DENIED and Defendants' Motion to Transfer Venue is GRANTED.

I. FACTUAL AND PROCEDURAL HISTORY

Jill Lindsay ("Plaintiff") is a flight attendant employed by American Airlines, Inc. ("American"), a wholly-owned subsidiary of AMR Corporation ("AMR"). See Notice of Removal of Defendant Association of Professional Flight Attendants ("APFA," and together with MR,"Defendants") Par. 7. APFA is the exclusive collective bargaining representative for American's

flight attendants. Id. Plaintiff filed the instant case on behalf of all APFA members affected by the actions of APFA and AMR to set aside a collective bargaining agreement (the "CBA") between American and APFA, which Plaintiff alleges was illegal, not duly executed and not validly approved under APFA's constitution. See First Amended Class Action Complaint ("FAC")Pars. 26, 69,70-72.

On September 19, 2003, Plaintiff filed the instant action in Los Angeles County Superior Court. On October 15, 2003, the FAC was filed, alleging causes of action for (1) breach of contract, (2) breach of fiduciary duty, (3) conspiracy to breach fiduciary duty, (4) breach of implied covenant of good faith and fair dealing, (5) breach of the duty of fair representation, (6) interference with prospective economic advantage, (7) interference with contract, (8) declaratory relief and (9) injunctive relief. On November 14, 2003 APFA removed the case to this Court. On the same date, AMR filed a notice of joinder in APFA's notice of removal and set forth additional grounds for the exercise of the Court's removal jurisdiction.

On January 5, 2004, Plaintiff filed her notion to remand and Defendants filed their joint motion to change venue. Plaintiff filed her opposition to Defendants' motion on January 14, 2004, to which Defendants replied on January 21, 2004. Defendants Opposed Plaintiff's motion on January 12, 2004. Plaintiff failed to file a reply in support of her motion to remand.

II. LEGAL STANDARDS

A. Motion to Remand

"The threshold requirement for removal under 28 U.S.C. § 1441 is a finding that the complaint contains a cause of action that is within the original jurisdiction of the district court," Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998). A "defendant bears the burden of actually proving the facts to support jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992) citing Garza v. Bettcher Indus., Inc., 752 F, Supp, 753, 763 (E.D. Mich. 1990)). Facts presented by the defendant are evaluated in light of the "'strong presumption' against removal jurisdiction."' Id. at 566 (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 258-89 (1938)). A defendant must show by a preponderance of the evidence the facts that support jurisdiction where challenged by the plaintiff. See Sanchez v. Monumental Life Insurance Co., 102 F.3d 398, 404 (9th Cir. 1996).

B. Motion to Change or Transfer Venue

1. First-to-File Rule.

The "first-to-file" rule allows a district court to transfer, stay or dismiss an action when a similar complaint has been filed in another federal court. Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623 (9th Cir.1991). In applying this rule, a court looks at three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the issues. Alltrade, 946 F.2d at 625-26; Pacesetter Systems, Inc. v. Medtronic Inc., 678 F.2d 93, 95 (9th Cir,1982). The first-to-file rule "should not be disregarded lightly." Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 750 (9th Cir.1979) .

2. 28 U.S.C. 1404 a Motion to Transfer Venue.

When considering a motion to transfer pursuant to 28 U.S.C. §1404(a), a court must consider (1) the convenience of parties, (2) the convenience of witnesses and (3) the interest of justice. The court may also look at other practical considerations including judicial economy, access to proof, reach of subpoena power, relative docket congestion and familiarity with governing state law. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 842-43 (9th Cir. 1984). The burden is on the moving party to demonstrate that transferring the case is appropriate. Id.

III. DISCUSSION

A. Plaintiff's Motion to Remand.

Plaintiff bases her motion to remand on the grounds that (1) the claims in the FAC are not inextricably linked with the parties' CBA and (2) that the outrageous conduct exception to the Railway Labor Act ("RLA") applies here and requires that the case be heard in state court. Defendants oppose Plaintiff's motion, arguing that (1) Plaintiff's claims are governed exclusively and completely preempted by federal law and are thus properly in federal court, (2) Plaintiff's remand argument is grounded on case law that is inapplicable to the claims presented in the FAC and (3) Plaintiff cannot avoid removal by adding an "outrageous conduct" component to her claims.

1. Plaintiff's Claims are Preempted by Federal Law.

In her motion, Plaintiff contends that the instant case is

based on state law, that the issues are not "inextricably intertwined" with the CBA and that interpretation of the CBA is not required. In Plaintiff's view, purely factual questions about an employee's or employer's conduct or motives do not require interpretation of a CBA. For support, Plaintiff relies on Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) and Lingle v. Norge, Division of Magic Chef, Inc., 486 U.S. 399 (1988). Plaintiff claims that the FAC involves state tort claims which do not require interpretation of the CBA, because issues involving the validity of the agreement itself do not require the interpretation of that agreement.

Defendants oppose Plaintiff's motion, arguing that the issues raised in Plaintiff's FAC are governed exclusively by federal law and are completely preempted. According to Defendants, Plaintiff's claims raise issues encompassed within the duty of fair representation, which are measured exclusively by federal labor law standards. A claim that a union has breached its duty of fair representation presents a federal question over which federal courts have subject matter jurisdiction. See Peters v. Burlington Northern R. Co., 931 F.2d 534, 537 (9th Cir. 1991). Defendants rely on Steele v. Louisville & Nashville RR, 323 U.S. 192, 201-203 (1944) for their contention that APFA's duty of fair representation arises out of and is governed by the RLA, and serves as a counterbalance to the exclusive authority given to APFA to represent American's flight attendants concerning the terms and conditions of their employment. According to Defendants, where a claim implicates the duty of fair representation, a district court possesses federal question jurisdiction even if characterized as a state law

claim. See BIW Deceived v. Local S6 Indus. U. of Marine and Shipbuilding Wrkrs., 132 F.3d 824, 831-832 (1st Cir. 1997).

Defendants contend that all of Plaintiff's claims implicate and/or fall within the ambit of the duty of fair representation because they relate to the negotiation, ratification and implementation of the CBA. Defendants urge the Court to reject Plaintiff's attempt to avoid federal jurisdiction by artfully pleading her federal duty of fair representation claims, arguing that attacks on the validity of a collective bargaining agreement present a federal question under the RLA, citing Int'l Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 691 (1963).

Defendants also argue that application of state law to Plaintiff's claims would conflict with the established policy of uniform application of federal law in federal labor law matters, a articulated in Central Airlines, id. at 591-692, in which the Supreme Court indicated that uniformity is essential in adjudicating challenges to the validity, interpretation' and enforceability of an RLA CBA.

Finally, Defendants distinguish Norris and its progeny, which Plaintiff relies upon in support of her contention that her claims are not preempted. Defendants argue that these eases are inapplicable, as they addressed issues having nothing to do with the collective bargaining relationship, the collective bargaining process, the validity of collective bargaining agreements or representational duties imposed upon unions by the duty of fair representation. For the foregoing reasons, Defendants urge the Court to deny

Plaintiff's motion to remand.

Having reviewed the parties' arguments and the relevant law, the Court finds that Plaintiff is not entitled to remand because her claims are preempted by federal law. First, as Defendants aptly note, one of Plaintiff's causes of action is for breach of APFA's duty of fair representation, and the breach of this duty is implied in her other causes of action as well. Federal district courts have subject matter jurisdiction over unfair representation claims arising under the RLA. See Peters, 931 F.2d at 587. "[S]tate law is preempted whenever a plaintiff's claim invokes rights derived from a union's duty of fair representation." BIW Deceived, 132 F.3d at 830. Second, remand of the case would be at odds with the RLA's goals of uniformity in adjudicating the validity and enforceability of collective bargaining agreements. Plaintiff challenges the validity of the CBA based on alleged improprieties in connection with negotiations. To allow the FAC to proceed in state court would thwart the Congressional goals in ensuring the uniform interpretation of the RLA. Third, Defendants are correct that neither Norris nor Lingle supports Plaintiff's motion to remand. In Norris, the Supreme Court held that a state law cause of action is not preempted by the RLA if it involves rights and obligations existing independent of a collective bargaining agreement. The Supreme Court ruled in Lingle that the LMRA did not preempt an employee's state tort claim far retaliatory discharge where interpretation of the collective bargaining agreement was not required. Unlike Norris and Lingle, both of which involved state law wrongful discharge claims, the instant case deals directly with the collective bargaining relationship, the collective bargaining

process, the validity of a collective bargaining agreement and the representational duties imposed upon Defendant APFA by the RLA's duty of fair representation, issues which are clearly governed by federal law. For the foregoing reasons, the Court DENIES Plaintiff's motion to remand, finding that her claims are preempted by federal law.

2. Plaintiff is Not Entitled to Remand Based on, Her outrageous Conduct Argument.

Plaintiff contends that even if the Court rules that her claims are preempted, she i still entitled to remand under the outrageous conduct exception to the general rule of RLA preemption, See Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1979); McCann v. Alaska Airlines, Inc., 758 F.Supp. 559, 563 (N.D, Cal. 1991). In Plaintiff's view, Defendants exceeded all acceptable bounds of behavior by (1) engaging in willful manipulation of the system, (2) deciding not to deal with designated union representatives but instead dealing directly with individual voting members of the union and coercing and intimidating the individuals they contacted in order to obtain their approval vote for the CBA. Based on these actions, Plaintiff asserts that the outrageous conduct exception warrants remand of this case.

In their opposition, Defendants point out that the alleged physical threats and intimidation of which Plaintiff claims are not in the FAC, and therefore cannot form the basis of her outrageous conduct argument. Furthermore, Defendants argue that the application of the outrageous conduct exception is limited to cases where there is little risk that the state

cause of action would interfere with the effective administration of national labor policy. Defendants also cite Farmer, 430 U.S. at 298 to support their position. According to Defendants, where the central claims are directed at the manner in which a union and employer negotiated, ratified or implemented a nationwide collective bargaining agreement and the relief sought is the invalidation of that agreement, the outrageous conduct exception does not apply.

The Court finds that Plaintiff is not entitled to rely on the outrageous conduct exception to federal preemption. The outrageous conduct exception is applied in cases where the "conduct was a merely peripheral concern of federal law" and affects "interests which [are] deeply rooted in local feelings and responsibility." See McCann, 758 F. Supp. at 563, citing Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir. 1978). The exception has been held to apply in cases where an airline employee brought suit against her employer for false imprisonment, slander, assault and intentional infliction of emotional distress (McCann); and where a union member alleged an ongoing campaign of public harassment and verbal abuse that caused the plaintiff to suffer "grievous mental and emotional distress a well as great physical damage" (Farmer). In both instances, the courts found that allowing the suits to proceed in state court would not interfere with the statutory scheme established by the RLA and that the outrageous conduct alleged was not protected by the RLA or even peripherally concerned with it. Unlike Farmer and McCann, in the instant case Plaintiff has failed to identify any conduct that rises to the level of outrageousness identified in farmer or McCann. Her allegations that Defendants

interfered with the negotiation process speak directly to the manner in which the union and employer negotiated, ratified or implemented the CBA, The Court therefore finds that the outrageous conduct exception to federal preemption does not apply and DENIES Plaintiff's motion to remand on this basis.

***

STATUTORY PROVISIONS

The Railway Labor Act, 45 U.S.C. §§ 152 First, Second, Seventh, and Eleventh and 182

§152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions . . .

§152 Second:

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§152 Seventh:

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act . . .

§152 Eleventh:

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any state, any carrier or carriers as defined in this Act and a labor organization or labor

organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted –

> (a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class . . .
>
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments . . .

§182:

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act [45 USCS §§151-163], except section 3 thereof [45 USCS §153], shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof [45 USCS §151].

The Labor-Mangement Reporting & Disclosure Act, 29 U.S.C. §§411 et seq: 29 U.S.C. §§411(a)(4), 411(b), 413, 431(a)

§411(a)(4):

No labor organization shall limit the right of any

member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . .

§411(b):

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

§413:

Nothing contained in this title [29 USCS §§411 et seq.] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§431(a):

Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary . . .

Judiciary & Judicial Procedure Act, 28 U.S.C. §§1367, 2201 and 2202

§1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental

jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution . . .

§2201:

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Supreme Court, U.S.
FILED

No. 091310 FEB 16 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JILL LINDSAY, ET AL, PETITIONERS

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, A BUSINESS ENTITY OF UNKNOWN TYPE, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do employees and/or former employees have the right to sue for violations of Sections 152, First and/or 152, Seventh of the Railway Labor Act ("RLA" or "the Act"), or is that right reserved exclusively to their union?

2. In interpreting those sections, can *Cort v. Ash*, 422 U.S. 66 (1975), be relied upon to imply a cause of action in favor of a union, but not its members, when it is only the members, not the union, that have suffered the injuries to be redressed?

3. Can the NLRA's *Garmon* doctrine be applied in the railway labor context so as to preempt claims seeking to vindicate balloting and ratification rights under a Union Constitution, where the claims are neither expressly preempted by the Railway Labor Act nor in actual conflict with it, and there is no administrative body to which the parties' controversies could have been submitted?

4. Can state-law claims alleging interference with and violation of ratification and balloting rights under a Union Constitution be treated as "identical" to DFR claims and, therefore, subsumed by DFR law?

PARTIES TO THE PROCEEDING

JILL LINDSAY, CAROL JOHNSON, DANIEL SANTIAGO, DEBORAH WHITTINGTON, DOTTIE LONG, JANET GOLD, JUDITH ALEXANDER, KAREN RIVOIRA, LAURENCE E. SALOMON III, PATRICIA KENNEDY, PATTY GENTRY and REBECCA SMITH were Plaintiff-Appellants below and are Petitioners here.

Plaintiff-Appellant CONSTANCE LaMATTINA is being listed as a Respondent in accordance with Supreme Court Rule 12.6.

The ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, AMR CORPORATION, AMERICAN AIRLINES, INC., and JOHN WARD were Defendant-Appellees below and are Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jill Lindsay, Carol Johnson, Daniel Santiago, Deborah Whittington, Dottie Long, Janet Gold, Judith Alexander, Karen Rivoira, Laurence E. Salomon, Patricia Kennedy, Patty Gentry and Rebecca Smith, respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit opinion, *Lindsay v. Association of Professional Flight Attendants* (Pet. App. 1-33), appears at 581 F.3d 47 (2d Cir. 2009). The opinion of the United States District Court for the Eastern District of New York on standing and DFR issues (Pet. App. 34-98) is reported at 645 F.Supp.2d 68 (E.D.N.Y. 2008). Its earlier Opinion on ordinary preemption (Pet. App. 99-130) is unreported.

JURISDICTION

The Second Circuit entered its opinion and Judgment on September 21, 2009. Justice Ginsburg granted an extension of time to file the petition until February 18, 2009. The District Court had jurisdiction pursuant to 28 U.S.C. §1331 and 1367(a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RELEVANT PROVISIONS INVOLVED

The Appendix (Pet. App.141-144) reproduces relevant provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., the Judiciary and Judicial Procedure Act,

28 U.S.C. §§ 2201 and 2202, and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq. Two provisions are reproduced here.

> §152, First of the RLA provides:
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> §152, Seventh of the RLA provides:
>
> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

STATEMENT

The courts below interpreted the RLA so as to transform the field of railway labor law into one in which unionized employees (and former employees) have only one potential right of action: a DFR claim against their union. (Pet. App. 9, 14). Under the rulings below, the union automatically holds and controls all other statutory claims and it is for the union alone to decide whether to assert them. By choosing

not to assert claims, the union can waive its members' vested rights.

The courts below also transformed the relationship between state and federal law so as to radically alter traditional preemption analysis. The Second Circuit eliminated the third tier of the traditional inquiry altogether, declaring that in this field "actual conflict is not a prerequisite" (Pet. App. 23), applied a preemption rule in the railway labor context that implemented Congressional intent under a significantly different statute (the NLRA), and interpreted the RLA as fully occupying a field Congress clearly chose not to occupy.

This Court's intervention is necessary to definitively resolve the preemption and standing issues raised by the RLA, the relevance of doctrines developed under the NLRA, and the interrelationship between state-law and federal common law that affect millions of railway labor employees and currently divide the Circuits. Its intervention is also required to ensure adherence to its standing and preemption jurisprudence.

A. The Events Leading To Suit

In 2001, American Airlines (hereinafter "the Carrier," "Employer" or "Airline") and its flight attendants concluded negotiations under Section 6 of the Railway Labor Act. They made their collective bargaining agreement ("CBA") amendable, at the earliest, November 30, 2004. (Ct. Appeals Jt. Appdx ("JA") 2411, ¶5-7). With its ratification, the right to wage and benefit levels vested through that date.

Although the CBA was supposed to remain in force at least until November 30, 2004, in early 2003, the Carrier suddenly demanded permanent and non-negotiable givebacks of $340 million/year- effective May 1, 2003.

After conducting a ratification vote that was unprecedented in the history of the American Arbitration Association[1]- and that the Union formally set aside as "tainted"– the Union agreed to the Airline's terms. (JA 1245-46; 1469-72). Neither the Carrier nor the Union contend that this second CBA (referred to as the "Restructuring Participation Agreement" or "RPA") was the result of Section 6 procedures. At no time did the Carrier apply to or receive the approval of a bankruptcy court to abrogate the original agreement.

After the ratification vote, three things became clear: (i) the level of concessions the Company demanded were determined by long-term competitive

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[1]The Administrator in charge of elections at the American Arbitration Association testified that, to the best of his knowledge, it was the only time in AAA's history that it had ever been asked to: extend a ratification vote beyond its original deadline, permit balloting to continue after results were announced, and change voting rules midstream. (JA 1245-6). AAA told the Union, "we have never done [this] before," (JA 1246) and required APFA to instruct it in writing. At the Airlines' urging, APFA not only directed AAA to re-open the vote and accept new ballots, but also to permit already-cast ballots to be changed. (JA 1482-83, 2426-27, JA 1607-09). It did so notwithstanding the fact that, under its Constitution, ballots received after the deadline specified for the vote were to be treated as "void" (JA 1467; Art.VI.5.E, Art.XI.I.E.2, Art.IX.6.A.4), and that it knew that a mid-term rules change could compromise the vote's integrity. (JA 152; JA147-8; JA2424-25 ¶¶89-91; JA 609-610).

considerations, and not—as had been represented- by the need to meet short-term contingencies; (ii) the Company intended those concessions to be permanent, regardless of its financial condition (JA 2412, 2414, 2422, 3632-33, 3648-49, 3689, 1334); and (iii) while it was comparing its costs to its low-cost competitors and determining how much to demand back from its employees, the Company had conferred significant new benefits on high-ranking management, (JA 2412 ¶11; 3641-42) including bonuses and a special bankruptcy-protected retirement plan for senior officers funded from the Company's cash balance. (Id.) Additional facts necessary for an understanding of Point II are presented there at note 21.

Petitioners are a group of American Airlines current and former flight attendants and current and former members of the Association of Professional Flight Attendants ("APFA" or "the Union") who sued both as individuals and on behalf of some 20,000 similarly situated past and present flight attendants. (JA 76). At least 2,000 members of the putative class are no longer bargaining unit members. (E.g., JA 5197 ¶53).

B. Petitioners' Claims and Injuries

Three sets of claims are relevant: (1) claims against the Carrier under the RLA and Declaratory Judgment Act for having violated RLA Sections 152, First and Seventh (the "status quo" or statutory claims);[2] (2) state-law claims against the Union and

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[2]Plaintiffs proceeded under §§152, First and Seventh and 28 U.S.C. §§2201 and 2202.

Carrier for violating or interfering with members' ratification and balloting rights ("Union Constitution" or "UC" Claims); and (3) claims against the Union for breaching its "duty of fair representation" ("DFR"), and against the Airline for causing or contributing to those breaches.

In each instance, Petitioners sought to redress *injuries inflicted on themselves and other employees, not injuries inflicted on the union.* They sought to recover at least a portion of the wages and benefits they lost as a result of the status-quo violations, and damages for the deprivation of their balloting and ratification rights. They did not seek a bargaining order or damages for the union.

The District Court had jurisdiction over Petitioners' claims under 28 U.S.C. §§1331 and 1367(a). Because the state-law claims concerned the Union's Constitution and *not* a collective bargaining agreement, [3] they did not present "minor disputes," could not be heard by an Adjustment Board, and were not preempted under *Norris v. Hawaiian Airlines*, 512 U.S. 246 (1994).

C. Proceedings In The District Court

The action began as three separate lawsuits: *Lindsay v. Association of Professional Flight Attendants* was commenced in the Superior Court for the County of Los Angeles; *Ford v. Association of*

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[3]Plaintiffs could not assert their breach of Constitution claims under Section 301 because 29 U.S.C. §185 does not apply to RLA employees.

Professional Flight Attendants, in the Eastern District of New York; and *Marcoux v. American Airlines, Inc.*, in the Southern District of New York.

Lindsay was removed to the United States District Court for the Central District of California, which denied plaintiff's motion to remand. (Pet. App. 131-140). The Union and Airline argued against remand on the ground that "all of Plaintiff's claims implicate and/or fall within the ambit of the duty of fair representation ...". (Pet. App. 136). Where that is so, they maintained, plaintiff's claims "are governed exclusively by federal law and are completely preempted." (Pet. App. 135). The District Court in large part agreed. (Pet. App. 131-140). It also transferred *Lindsay* to the Eastern District of New York where, following transfer of *Marcoux*, the three cases were assigned the same Judge and subsequently consolidated.

In 2006 and 2008, Respondents sought dismissal of the statutory and state-law claims on legal grounds, and the DFR claims on the merits. The District Court granted Defendants' motions in their entirety, dismissing the statutory claims for failure to state a claim (Pet. App. 69-74) and the state law claims as preempted (Pet. App. 107-114). It granted Defendants summary judgment on the DFR claims (Pet. App. 81-90), and dismissed the motion for class certification as moot (Pet. App. 91).

D. Proceedings In The Court of Appeals

The Second Circuit affirmed. (Pet. App. 1-33). Like the District Court, it held that where there is a

functioning union, only the union- not its members- can sue under the relevant sections of the Railway Labor Act. (Pet. App. 4-16). Also like the District Court, it found Petitioners' "Union Constitution claims" preempted. It did so on the ground that they were "in substance, identical to ... DFR claims" and, thus, preempted under *Garmon*. (Pet. App. 16-24, 32n.8) Finally, it reiterated that, in the case of DFR claims, the principal question is whether the union has acted "so far outside a wide range of reasonableness" as to be "wholly irrational or arbitrary" (Pet. App. 25, 29, 33n.9), even when the conduct called into question relates to internal union matters rather than traditional negotiations or grievance-handling.

E. The Statutory Scheme

The RLA is *sui generis* in several respects. Two of them distinguish it from the NLRA, and those differences are critical to the division among the circuits submitted for this Court's resolution.

Section 6 Procedures: The Act choreographs an elaborate and precisely sequenced set of procedures that "carriers" and "employees" are required to follow during the course of bargaining. The procedures are extensive and each phase is mandatory. They begin with lengthy arms-length negotiations between the parties' representatives and progress through mediation, voluntary arbitration, and a mandatory 30-day cooling off period. While they are working their way through these stages, neither party may alter the status quo. It is only once these procedures have been exhausted, *without* an agreement having been reached, that the parties may resort to self-help. If- as a result

of this process- a collective bargaining agreement is concluded, then, the provisions of §152 Seventh obtain.

Administrative Agencies: There are two types of administrative agencies under the Railway Labor Act: the National Mediation Board ("NMB") and Adjustment Boards. The Adjustment Boards adjudicate "minor disputes."[4] The NMB has no equivalent adjudicatory authority. See, e.g., *Chicago & North Western Rwy. V. UTU*, 402 U.S. 570, 580 (1971)(the NMB has no adjudicatory function under the 1926 Act); *Detroit & T.S.L.R. Co. v. UTU*, 396 U.S. 142, 158 (1969)(the NMB has "no adjudicatory authority with regard to major disputes nor has it a mandate to issue regulations construing the Act generally"); *Pan American World Airways, Inc.*, 7 N.M.B. 168, 225 (1979). It has no authority to interpret the Act, enjoin statutory violations, award damages for such violations, or otherwise adjudicate employee-carrier claims. Claims to the effect that the Act has been violated can only be adjudicated by a court.

The administrative scheme established by the RLA is thus the reverse of that established by the NLRA. Under the NLRA, statutory violations *can only be decided by an agency* (the NLRB), while claims that a CBA has been breached come within the subject matter jurisdiction of the courts.[5] See L.M.R.A., §301,

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[4]"Minor disputes" refer to grievances that require the interpretation of the terms of a collective bargaining agreement.

[5]Of course, when the parties have agreed that a contractual grievance-and-arbitration procedure shall be an employee's exclusive remedy, the employer can defend against a claim in court on the grounds that the employee has failed to exhaust contractual remedies. Generally, an employee can only overcome that defense

29 U.S.C. §185. Under the RLA, statutory violations *can only be decided by a court*, while claims that a CBA has been breached must be brought before an Adjustment Board. In other words, claims committed to an agency under the NLRA are committed to the courts under the RLA, and vice versa. In sum:

Type of Claim	Under The NLRA	Under The RLA
Statutory violations	Primary jurisdiction over these claims lies in the NLRB. State and federal courts cannot entertain them.	Claims for violations of § 152 can *only* be decided by a court. No agency or Board has jurisdiction.
Claims that a CBA has been breached.	These claims can be brought in court, provided the parties have not made a contractual grievance-&-arbitration procedure the exclusive remedy. (See footnote 5.)	Known as "minor disputes," these claims can only be brought before an Adjustment Board in the first instance, not to court.

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by showing (i) that the CBA gave his Union control over the grievance-and-arbitration process, and (ii) that, in handling his grievance, the Union breached its "DFR." Even where he has not sued his union, an employee will be required to prove "hybrid claims." In other words, his ability to proceed against his employer for a breach of the CBA will be *conditioned on* his proving a related DFR-breach by his union.

The fact that there is no RLA equivalent to the National Labor Relations Board– i.e., no agency with jurisdiction to interpret the RLA and rule on statutory violations– leads to dramatic consequences. (This is discussed at Point II).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EMPLOYEES AND FORMER EMPLOYEES HAVE THE RIGHT TO SUE FOR VIOLATIONS OF THE "STATUS QUO" PROVISIONS OF THE RLA.

A. The Circuits Are Divided On The Issue Of Whether Current Employees Have A Private Right of Action

The Court below concluded, as a matter of first impression, "that neither §152, First nor §152, Seventh provides a private cause of action to individual employees against their employers under the circumstances present here." (Pet. App. 16). Much mischief lurks in that phrase and, if not rapidly repaired, like a leaking oil tanker, will quickly pollute the surrounding waters.

While the holding is ultimately qualified to mean that the only party with standing to sue for violations of the status quo is the union– a conclusion in direct and substantial conflict with this Court's "associational standing" and labor law jurisprudence (*see* Points I.B.1

and .2 below)– it is rooted in the conviction that relevant sections of the RLA, and perhaps the entire Act, imply no private right of action at all. (Pet. App. 5-6, 8-10, See Opn at 5, 7, 17.) At least three Circuits have expressly rejected the analysis upon which the Second Circuit rested this preliminary conclusion. See *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 671 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 926-27 (1st Cir. 1983); *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1032-1034 (9th Cir. 1970).

Equally importantly, both this Court and every other Circuit[6] have recognized the existence of a private right of action for violations of the status quo. *See generally, Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 302-303 (1989); *Chicago & N.W.R. Co. v.United Transportation Union*, 402 US 570, 574-581(1971); *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U.S. 142 (1969); *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960); *Order of Rwy Conductors of America v. Pitney*, 326 U.S. 561, 566 (1946); *Order of Rwy Telegraphers v. Railway Express Agency*, 321

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[6] *See, e.g., I.A.M. v. Transportes Aereos Mercantiles*, 924 F.2d 1005 (11th Cir.)(under §152, First), *cert. den'd*, 502 U.S. 855 (1991); *United Transport. Union, L. 63e v. Penn Cent.*, 443 F.2d 131 (6th Cir.)(under §§152, Seventh and 156), *cert. den'd*, 404 U.S. 938 (1971); *Southern Ry. v. B.L.F.E.*, 384 F.2d 323 (D.C. Cir. 1967)(under §152, First); *United Indus. Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (under §152, Seventh and 156), *on appeal following remand*, 368 F.2d 412 (1966), *on appeal following second remand*, 400 F.2d 320 (1968), *cert. denied*, 395 U.S. 905 (1969); *Railroad Yardmasters v. Pennsylvania R.Co.*, 224 F.2d 226 (3d Cir. 1955)(under §152, Seventh).

U.S. 342, 347 (1944); *Virginian R.Co. v. System Federation, No. 40*, 300 U.S. 515, 542-550 (1937); *Texas & New Orleans R.R.Co. v. Bhd. of Rwy & Steamship Clerks*, 33 F.2d 13, 14-17 (5thCir. 1929), *aff'd*, 281 U.S. 548, 565-566, 569 (1930).

Given the virtually universal reading of the statute and status quo provisions as privately enforceable, the Second Circuit ultimately rested its decision on somewhat narrower grounds: even assuming some private right of action, it is not available to employees. (Pet. App. 9, 16).

The Circuit's position on this narrower issue can be viewed from two perspectives: either that employees do *not* have standing to sue under the Act, or that *only* unions do. (Pet. App. 10-13, 16). Whichever is adopted, the Second Circuit's decision is in conflict with other Circuits and seminal decisions of this Court.

Seven Circuits have reviewed claims filed by employees under one of the two status quo provisions at issue here. The Second stands alone in finding that employees lack standing. Every other Circuit has either acknowledged or *assumed* they had standing or would have standing where the "status quo" is actually implicated. *See, e.g., Regional Airline Pilots v. Wings West Airlines*, 915 F.2d 1399, 1403 (9th Cir. 1990), *cert. den'd*, 501 U.S. 1251 (1991)(dismissing claims by employees and union where there had never been a CBA or any "negotiation process instituted at all"); *Kushto v. Bhd. of Rway Airline & Steamship Clerks*, 818 F.2d 290 (4th Cir. 1987)(employees' claims presented a "minor" rather than "major" dispute);

Carbone v. Meserve, 645 F.2d 96 (1st Cir.), *cert. den'd*, 454 U.S. 859 (1981)(same); *Mungin v. Florida East Coast Rwy Co.*, 318 F.Supp. 720, 724, 725, 730 (M.D.Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. den'd*, 404 U.S. 897 (1971)(on remand, reiterating holding that employees have a cause of action); *Mungin v. Florida East Coast Rwy Co.*, 416 F.2d 1169 (5th Cir. 1969)(earlier appeal in which Circuit expressly recognized employees' right to sue); *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881, 885 (7thCir.), *cert. den'd*, 368 U.S. 900 (1961)(employees' claims presented a "minor dispute"); *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282 (6th Cir.), *cert. den'd*, 356 U.S. 937 (1958) (affirming injunction issued *inter alia* under 152, Seventh); *Dwellingham v. Thompson*, 91 F.Supp. 787 (E.D.Mo. 1950), *aff'd sub nom. Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952)(affirming entry, in mixed dispute context, of preliminary injunction that restored the status quo).[7] While the employees' claims under the "status quo" provisions did not, in many instances, prosper, their standing to sue was effectively acknowledged. None of the decisions even suggests employees may not have standing, or that only their union would.

Only two Circuits have clearly held that employees do **not** generally have a private right of action under the Railway Labor Act: the Second Circuit in this case and the Third Circuit in *Bensel v.*

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[7]*See also Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 908-910 (6th Cir. 1983) (analogizing an employee's right to sue under the RLA with the right to sue under section 301 and noting that "[t]he rights of the individual employee as against the employer are not coextensive with those of the union").

Allied Pilots Ass'n, 387 F.3d 298 (3d Cir. 2004), *cert. den'd*, 544 U.S. 1018 (2005). At best, *Bensel* provides only arguable support for the Second Circuit's decision.[8] It may even support Petitioners on the specific issue of employees' right to sue their employer for violations of the status quo.[9]

B. When The Issue Of Standing Is Viewed From The Opposite Perspective And The Question Is Whether Unions Alone Have The Right To Sue, The Second Circuit's Decision Also Conflicts With Controlling Decisions of This Court, Both in The Labor And Article III Standing Context.

Because the injuries sought to be redressed in this suit are those *employees* have suffered– as opposed to those suffered by a union– the union could only have brought this suit if it had third-party standing. *See generally Associated General Contractors v. Carpenters*, 459 U.S. 519, 541 n.46, 545 (1983); *Transportation Workers Union v. Transp. Secretary*, 492 F.3d 471, 475 (D.C.Cir. 2007); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 618 (6th Cir. 2004)(noting that a union could not sue in its own right "for depressed wages because it does not receive wages; it negotiates them;" to represent employees on such a

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[8]The employees in *Bensel* did not sue for status quo violations or under §§152, First and/or Seventh.

[9]In a separate part of the decision, the Third Circuit states that plaintiffs *had* "statutory rights" under the status quo provisions that they did not waive. It then treats those claims as if they had been asserted by the employees and concludes, on the facts, that the status quo was not violated. 487 F.3d at 315-316.

claim, it would have to sue in an "associational capacity").

Theoretically, there are three sources from which a union could derive the authority to sue on employees' behalf. Congress could authorize it to sue. The employees themselves could authorize it to sue. Or, it could base its authority to sue on "representative" or "associational standing" principles. The Courts below relied exclusively on authority conferred by Congress pursuant to the Railway Labor Act.[10] Under their reading of the Act, under the statute, a union automatically acquires the right to sue on employees' behalf when the majority of a "craft or class" chooses it as their bargaining agent. Its right to sue is not only automatic, according to the *Lindsay* Courts, but also exclusive, precluding employees from suing on their own behalf. (Pet. App. 11-13, 16-17).

Each aspect of this holding contravenes this Court's precedents. The view that a union automatically obtains the right to assert and settle claims when it becomes employees' exclusive bargaining agent is contradicted by *Elgin v. Burley*, 325 U.S. 711 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946), and the suggestion that it obtains an exclusive right to sue on its employee-members' behalf is contradicted by this Court's Article III "associational standing" jurisprudence.

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[10]As previously noted, they could not rely on Section 301 since it does not apply to RLA employees. (It doesn't apply for obvious reasons: because it authorizes suit in court for breaches of a CBA. Under the RLA, breach-of-CBA claims are to be brought before an Adjustment Board.)

1. The Second Circuit's Decision Contravenes *Elgin*.

In *Elgin, Joliet & Eastern Rwy Co. v. Burley*, *supra*, this Court drew a line between majority rule and individual rights. It held:

(1) that one cannot assume from the fact that a union "occupie[s] the position of collective bargaining agent and as such ha[s] power to deal for the future," that it has similar authority "to settle" or "represent" employees on claims, looking to the past. 325 U.S. at 741.

(2) that neither of the latter prerogatives is "part of the collective agent's exclusive statutory authority," *id.* at 740, and

(3) that, for a certified union to act in either such capacity, it must first be expressly authorized to do so by the employees it represents. *Elgin* effectively establishes a consent rule. A union must be given express authority "over and above any authority given by the statute" before it can represent or settle employees' claims. *Id.* at 741. Its authority is not automatic.

The Second Circuit held the opposite: that the statute conferred on APFA the exclusive authority to sue on the flight attendants' behalf by virtue of the fact that it is their bargaining agent. While *Elgin* would not preclude a finding, under the appropriate circumstances, that a union has third-party standing, it makes it clear that the RLA itself could not confer such standing.

2. The Second Circuit's Decision Contravenes *Warth, Hunt, and Brown Group.*

There is no statutory basis for third-party standing, and no claim of express authorization here. The only basis upon which to find third-party standing lies in the representative or associational standing principles developed in the context of this Court's Article III jurisprudence. The decision below stands that jurisprudence on its head. It implies a cause of action in favor of an entity that does not itself meet Article III's requirements (the Union), to the exclusion of those who clearly do (the employees).

This Court has made it clear that under representative or associational standing principles, a union can only sue on its members' behalf when the members could themselves sue in their own right. *See generally, N.Y. State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 9 (1988)("an association has standing to sue.... when ... members would have standing to bring the same suit"); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511, 516 (1975). *See also United Food & Commercial Union v. Brown Group*, 517 U.S. 544, 551-552 (1996). This is because the Union's standing in these circumstances is derived from that of its members. Accordingly, any standing it has is cumulative, not exclusive. It does not displace its members' rights. Thus, far from APFA being the only appropriate plaintiff here, in fact APFA would only have been able to sue because its members also have that right.

3. The Second Circuit's Interpretation Of The RLA Brings It Into Direct Conflict With The Plain Language Of 29 U.S.C. § 411(a)(4).

In 1959, Congress passed what has generally come to be known as the Union Member Bill of Rights. Section 101(a)(4) of the L.M.R.D.A., 29 U.S.C. § 411(a)(4), states as follows:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before an administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, ...

29. U.S.C. § 411(a)(4). By holding that a designated union inherently limits – indeed eliminates – its members' right to sue, the ruling below not only contravenes the Railway Labor Act, it clashes with this express Congressional prohibition.

Early in its Opinion, the Second Circuit acknowledges that the status quo provisions "may well benefit" employees. (Pet. App. at 10, 15). It then proceeds, under the second and third of *Cort v. Ash*'s four factors,[11] to imply a private right of action *only* in favor of their "association." (Pet. App. 11-12, 15-16). So doing, it not only contravened the intent of the status quo provisions, the Act as a whole, and L.M.R.D.A.

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[11]422 U.S. 66 (1975).

§101(a)(4), but also effected an end-run around this Court's established "associational standing" jurisprudence and basic Article III requirements. (Pet. App. 8-12, 15). This Court should grant certiorari to make it clear that no cause of action can be "implied" from any statute in violation of its Article III jurisprudence.

C. The Circuits Are Divided On The Issue Of Whether A Union Can Represent Former Employees.

Approximately one-third of the plaintiff group and several thousand members of the putative class are no longer employed by the Airline or members of the Union. (See e.g., JA 5197 ¶53). See generally, *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971)("[r]etirees are neither 'employees' nor bargaining unit members").

The Circuits are deeply divided on the question of whether a union can represent former employees. There are four views. At least two Circuits take the position that a union does not have associational standing to represent non-members. See *United States v. City of Miami*, 115 F.3d 870, 872-873 (11th Cir. 1997)(union not have associational standing to represent non-members); *Bangor & Aroostoock R.Co. v. B.L.F.E.*, 442 F.2d 812, 820 (D.C.Cir. 1971)(same). *See also I.B.E.W. v. Citizens Telecom. Co. of*

California, 549 F.3d 781, 787, 789 (9th Cir. 2008)(probably not have associational standing).[12]

The Fifth, Sixth and Seventh Circuits have effectively adopted a consent rule. *See, e.g., I.A.M. v. Goodrich*, 410 F.3d 204 (5th Cir.), *cert. den'd*, 546 U.S. 1015 (2005); *United Steelworkers v. Cooper Tire*, 474 F.3d 271, 283 (6th Cir. 2007); *Cleveland Electric v. Utility Workers Union Local 270*, 440 F.3d 809, 818 (6th Cir. 2006); *Exelon Generation v. Local 15*, 540 F.3d 640 (7th Cir. 2008); *Rossetto v. Pabst Brewing Co.*, 128 F.3d 538, 538-539 (7th Cir. 1997), *cert. den'd*, 524 U.S. 927 (1998). The Eighth Circuit takes the position that a union can incidentally represent former employees in a suit legitimately brought in its own interests. *See I.B.E.W. v. GKN Aerospace*, 431 F.3d 624 (8th Cir. 2005).

Only the Second Circuit has held that a union has an automatic and exclusive right to sue on behalf of former employees. (Pet. App. 2, 15-16).[13] Like the issue concerning the union's preemptive right to represent *current* employees, this is an issue that potentially affects millions of employees in all unionized industries and all Circuits. Also like that issue, it implicates and must be decided in conformity with associational

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[12]Because the union had associational standing to represent those who were still employees, it was not deprived of standing to compel arbitration. 549 F.3d at 789.

[13]Indeed, the Second Circuit appears to have believed that all of the plaintiffs and everyone in the putative class are former employees. (Pet. App. 2). That is mistaken. While a substantial number are, both the plaintiff group and putative class include past and present employees, and former and current union members. (Pet. App. 66, 100).

standing principles. Given the plethora of views on the issue, this Court's intervention is required.

D. Reasons The Issue Of Standing Is Important: Because The Court Of Appeals Improperly "Hybridized" - Indeed "Over-Hybridized" - The Law And Permitted Majority Rule To Extinguish Vested Rights.

The Court of Appeals "superhybridized" the employees' claims against their employer when no hybridization was warranted. The term "hybrid claims" is used in the labor context to characterize claims for which an employee's ability to sue his employer is *conditioned upon* first being able to show that his or her union breached its duty of fair representation. The circumstances under which claims can properly be treated as "hybrid claims" are very, very limited.[14] None of the three preconditions for hybridizing is present here.

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[14]"Hybrid claims" arise only when: (1) an employee sues his employer for the breach of a collective bargaining agreement; (2) the bargaining agreement establishes an extra-judicial procedure (generally, a grievance-and-arbitration procedure) as the employee's exclusive remedy; and (3) the union is expressly given control of the extra-judicial procedure by the agreement. Under these circumstances, an employee will be relieved of his "failure to exhaust his contractual remedies" and be permitted to proceed against his employer in court if he can prove that, as a result of a DFR breach by his union, he was deprived of his extra-judicial remedy. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n*, 493 U.S. 67, 80 (1989); *DelCostello v. I.B.T.*, 462 U.S. 151, 163-165 (1983); *UPS v. Mitchell*, 451 U.S. 56, 61-62 (1981); *Hines v. Anchor Motor Freight*, 24 U.S. 554, 567-570 (1976); *Vaca v. Sipes*, 386 U.S. at 184-186.

The decision below did not simply *condition* the employees' right to sue their employer on their first proving a DFR breach, but substituted a DFR claim against *the union* for any and all claims against *the employer*. (Pet. App. 9, 14).

Unless the Second Circuit's decision is reversed, this substitution will have far-reaching consequences. As a practical matter, it will transform unions from an agent and advocate for employees into a shield for employers. As a legal matter, it will leave employees with only one source from which to recover significant economic losses: their union.

Making unions solely liable for losses inflicted by employers violates principles to which this Court has long adhered regarding the proper allocation of damages as between an employer and a union. *See, e.g., Bowen v. United States Parcel Service*, 459 U.S. 212, 221-223 (1983);[15] *IBEW v. Foust*, 442 U.S. 42, 49-50

The law of "hybrid claims" has *no* application to a case such as this, where the claims against the employer are *statutory claims* rather than those brought under a collective bargaining agreement that provides for what parties have agreed should be a union-controlled administrative procedure. As noted *infra*, in the railway labor context, statutory claims can *only* be heard in a judicial forum; they cannot be referred to any agency. Therefore, statutory claims against an employer under the RLA and DFR claims against a union cannot be made "hybrid claims." Even when they arise out of common facts, claims against an employer for violating the status quo do not *depend upon* the DFR claims. See, e.g., *Repstine v. Burlington Northern, Inc.*, 149 F.3d 1068, 1071-1072 (10th Cir. 1998).

[15]Four Justices, including then Associate Justice Rehnquist, dissented in *Bowen* on the grounds that the employer should have

(1979); *Vaca v. Sipes*, 386 U.S. 171, 196-198 (1967). Under those principles, an employer is neither to be relieved of nor "shielded from the 'natural consequences' of its breach by wrongful union conduct"[16] and employees are not to be left "remediless." 459 U.S. at 222. The latter principle, often referred to as the "compensation principle," is "[o]f paramount importance." *Id.* Under it, employees are entitled to be made whole.

Substituting a "DFR claim" against the union for all claims against the employer, would institute a scheme that violates both principles. It would relieve employers of statutory responsibilities of which they are not entitled to be relieved, and leave employees with no effective remedy. Indeed, it would require employees to satisfy a standard of liability that it is virtually impossible to meet in order to obtain a judgment against a defendant that cannot make them whole.

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been "primarily liable for all backpay;" no portion should have been shifted to the union. 459 U.S. at 231-243.

[16]"Thus if the petitioner in this case does not collect the damages apportioned against the Union, the ... [Employer] remains secondarily liable for the full loss of backpay." *Bowen*, 459 U.S. at 223.

II. THE COURT SHOULD GRANT CERTIORARI TO RE-ESTABLISH ORDER IN THE AREA OF RLA PREEMPTION AND CLARIFY THE RELATIONSHIP BETWEEN DFR LAW AND CLAIMS THAT RIGHTS UNDER A UNION CONSTITUTION HAVE BEEN VIOLATED.

While this Court attempted, in *Norris v. Hawaiian Airlines, supra*, to settle the issue of RLA preemption for all time, in the past ten years, the law on this issue has shown greater entropy than cohesiveness: different Circuits take widely different views and apply markedly different tests. (See Subpoint C, *post*). With the Opinion below, the Second Circuit has accelerated the pace at which the federal labor-law universe is expanding, and the state-law universe contracting.

The decision below clones the rule prescribed by *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and grafts it on to the RLA.[17] While acknowledging that "*Garmon* was decided in the context of the National Labor Relations Act," the Circuit relies on two decisions to "extend" *Garmon* to the RLA: this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) and the decision in *Bensel*, 387 F.3d at 321. (Pet. App. 19).

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[17]Superficially, the clone is distinguishable from its NLRA-model in only one respect: It preempts claims concerning conduct actually or arguably protected or prohibited *by the RLA, instead of the NLRA*. (Pet. App. 17, 19, 23, 110). Beneath the surface, the differences are far-reaching.

Once again, the Second and Third Circuits stand together, but alone, in their misreading of this Court's precedents. They misread the *Jacksonville Terminal* decision. This Court did not apply *Garmon* preemption in that case; but rather, what has come to be known as *Machinists* preemption.[18] It even expressly cautioned against confusing the two types of preemption.[19] Thus, it warned that "care must be taken to distinguish preemption based on federal protection of the conduct in question ... from that based predominantly on the primary jurisdiction of the National Labor Relations Board." 394 U.S. at 384 n.19. It identified *Garmon* as the second type of preemption and *Machinists* is a quintessential example of the first type.[20]

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[18]All doubt on this question is eliminated by two facts: The decision in *Machinists* adopts *Jacksonville's* preemption test *verbatim*, and expressly credits *Jacksonville* with having formulated the correct test. *See International Association of Machinists v. Wisconsin Employment Relations Board*, 427 U.S. 132, 147-148 (1976)(*Jacksonville* test embraced by the majority); Concurrence at 155 (agreeing *Jacksonville* provides the correct test): Dissent at 156-159 (*Garmon* should have been applied instead).

[19]It also generally cautioned against applying NLRA policies to the RLA: "We refer to the NLRA's policies not in order to 'apply' them, ... [this] would be neither justified nor practicable- but only to determine whether [the activity in question, there picketing] is within the general penumbra of conduct held protected by the Act, or whether it is beyond the pale of any activity thought permissible." 394 U.S. at 384. It further noted that "Congress has invested no agency with even colorable authority" to adapt "the NLRA's principles to railway disputes," *id.* at 391-392, and that the RLA has no agency equivalent to the NLRB. *Id.* at 384 n.19.

[20]*Machinists* preemption protects conduct that Congress intended to be *un*regulated from regulation by state law.

Because the Second Circuit's decision misreads *Jacksonville* and ignores important differences between the RLA and the NLRA, its decision is irreconcilable with fifty years of this Court's preemption jurisprudence.

A. The Ruling Below Contravenes Sears Roebuck & Co

In *Sears, Roebuck & Co.*, 436 U.S. 180, 183,187-188, 201-202 (1978), this Court recognized two prerequisites to *Garmon's* application: (1) an agency with jurisdiction over the parties' controversy; and (2) an ability on the part of a litigant either himself to invoke or induce his opponent to invoke its jurisdiction. *Id.* Put even more simply, for *Garmon* to apply, there must be an agency to which the specific controversy or claims could have been submitted.

There is no such agency here. This is so whether one accepts the thesis posited by the Courts below - i.e., that the "UC Claims" concern conduct actually or arguably protected or prohibited by the RLA- or whether, as *Belknap v. Hale*, 463 U.S. 491, 510 (1983), suggests is appropriate, one examines the character of the claims more closely.

1. There is No RLA Agency With Jurisdiction Over Statutory Claims

Even assuming plaintiffs' "UC claims" could arguably be characterized as stating violations of the Railway Labor Act, this Court has made it unmistakably clear that, under the RLA, statutory violations are not consigned to any agency. *See Communications Workers v. Beck*, 487 U.S. 735, 743 (1988) ("Unlike the NLRA, the RLA establishes no agency charged with administering its provisions, and instead leaves it to the courts to determine the validity of activities challenged under the Act").

2. There Is No RLA Agency With Jurisdiction Over DFR Claims Or Violations Of A Union's Constitution

Three state-law claims are still at issue in the lawsuit. Claim Eleven seeks damages against the Union for having violated its members' balloting and ratification rights under its Constitution and Bylaws. Claims Twelve and Sixteen seek damages against the Carrier for having intentionally interfered with the union-member contract.

The Second Circuit characterized these claims as being "identical to" or "in substance, identical to ... DFR ... claims" and therefore, arguably an RLA violation. (Pet. App. 31 n.6, 32 n.8). Petitioners characterized them as traditional claims in contract and tort for the violation of rights under a union constitution.[21]

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[21]The fact that the "UC" and "DFR" claims arise out of the same nucleus of operative fact does not make them "identical" or "in substance, identical." (But see Pet. App. 32n.8). In their DFR claims, Petitioners sought to prove that the Union had acted in bad faith. In their "UC Claims," Petitioners sought to prove that the Union had violated specified provisions of its Constitution.

Specifically, they sought to prove, *among other things*, that:

1) APFA set up an electronic voting system that did not satisfy the requirement of APFA's Constitution that a vote or referendum be "secret." (The system it set up utilized two numbers neither of which was secret: The first consisted of employees' ID numbers- known to both APFA and Airline- and publicly emblazoned on each employee's work badge. (JA 2429 ¶121-122; Pet.App. 60). The second (the PINs) were assigned sequentially, by base, **in alphabetical order.** Any flight attendant with access to a list of attendants flying out of his or her base, and knowledge of his own PIN, could easily ascertain the PIN of *every* other potential voter. (JA 1738-2409; JA 2429 ¶123). Using these two numbers, anyone's ballot could be accessed on a computer. (JA1743-4).

2) while the balloting was underway, APFA and Airline both monitored the vote, in further violation of the secrecy requirement, (Pet. App. 26);

3) probably as a result of information gleaned from the monitoring, they made changes to the proposed agreement *while it was being voted on.* (This violated the Constitutional provision requiring that the membership "be given the complete changes to ... [the] Collective Bargaining Agreement ... *prior to or at the start* of the balloting period." (Pet. App. 87, 93, 103). (Because of these changes, different people voting on different days voted on different proposed agreements.

Whether these claims are viewed as, "in substance, identical to DFR claims" or as distinct claims for violations of rights under a contract, it remains clear that there is no RLA agency to which they could have been submitted.

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4) when, an hour or two before the voting was scheduled to close, it became apparent that the agreement was nonetheless going to be rejected, Airline and APFA's leadership met and agreed what to do (JA 1482-3; JA 2426-7 ¶¶99-100, JA 1607-9)

5) consistent with this agreement, APFA directed the American Arbitration Association to re-open the vote, accept additional ballots and permit already-cast ballots to be changed. (The Constitution provided that ballots cast or received after the date and time specified on the ballot were "void." (JA 1467; Art.VI.5.E, Art.XI.I.E.2, Art.IX.6.A.4) It also required that "valid ballots" be counted. (*Id.*; Art. III.1.B; Art.IX.1.D-F-G; JA1565-6 Art.VI.5.K; Art.VI.4). Both provisions were violated.)

6) during the extension, Company went to extraordinary lengths to pressure flight attendants to vote, or change their votes to "Yes." So pervasive was company interference that APFA wrote the Company, demanding "BACK OFF AND STAY OUT OF OUR VOTING PROCESS." Company ignored APFA's protests. (JA 2427-8 ¶¶111-17, JA 1371; JA 1612; JA 1545; JA 1461; JA 1182-87; JA9 58-59; JA 823-24; JA 852-54; JA 3681; JA 482-90; JA1187);

7) because of the Company's actions during the extension and its withholding of information regarding executive bonuses and perks, on 4/22/03, APFA's Board of Directors determined that the ratification vote had been *"tainted"* and *formally* set it aside. (JA 1469-72). It directed that a new vote be conducted in accordance with its Constitution and announced the new vote to the membership. *Id.*

8) three days later, APFA cancelled the new vote and, despite its lack of authority to do so under its Constitution, signed an agreement with the Company. (JA 1479-81; JA 1537-42; Pet. App. 65-66), thereby depriving the membership of the ratification vote the Union Constitution mandated. (JA 1467, Art.III.2.A; Art.XI.1).

Ten circuits have interpreted *Garmon* as have Petitioners, requiring the preemption decision to be made with a scalpel, not a hatchet. The test is not whether a vast area of disputes is covered by the Act, but whether a specialized agency has been charged with resolving the specific controversy presented to the court.[22]

B. The Ruling Below Contravenes This Court's Decisions In Davis, Belknap And An Unbroken Line of Precedents

In an effort to avoid the problem posed by the absence of any agency to defer to, the Second Circuit has attempted to recast *Garmon* as a "choice-of-law" rule, the objective of which is to determine whether a particular state law might "'stand[] as an obstacle to

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[22]These Circuits only apply *Garmon* to preempt state-law claims where the controversy presented by them is "identical to one which could have been brought before the NLRB." *See, e.g., E.I. Dupont de Nemours & Co. v. Sawyer*, 517 F.3d 785 (5th Cir. 2008); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1165-1166 (10th Cir. 2004), *cert. den'd*, 545 U.S. 1149 (2005); *Pace Industries v. NLRB*, 118 F.3d 585, 589 (8th Cir. 1997), *cert. den'd*, 523 U.S. 1020 (1998); *Tamburello v. Comm Tract Corp.*, 67 F.3d 973, 980-981 (1st Cir. 1995), *cert. den'd*, 517 U.S. 1222 (1996); *Loewen Group v. Haberichter*, 65 F.3d 1417, 1425-1426 (7th Cir. 1995); *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1178-1179 (D.C.Cir. 1993), *cert. den'd*, 511 U.S. 1003 (1994); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 659-660 (7th Cir. 1992); *Platt v. Jack Cooper Transport*, 959 F.2d 91 (8th Cir. 1992); *Parker v. Connors Steel*, 855 F.2d 1510, 1516-1518 (11th Cir. 1988), *cert. den'd*, 490 U.S. 1066 (1989); *Serrano v. Jones & Laughlin*, 790 F.2d 1279, 1288 (6th Cir. 1986); *Sheet Metal Workers Int'l v. NLRB*, 716 F.2d 1249, 1263 (9th Cir. 1983); *United Credit Bureau of America v. NLRB*, 643 F.2d 1017, 1025-1026 (4th Cir. 1981), *cert. den'd*, 454 U.S. 994 (1981).

the accomplishment and execution of the full purposes and objectives of Congress." (Pet. App. 20). It then attempts to meet that test by recasting Petitioners' "UC Claims" as claims that concern "conduct central to Congress's RLA goals" and "core RLA conduct." (Pet. App. 22).

In each respect, the ruling below conflicts with both this Court's decisions and the decisions of other Circuits. Not only are activities related to contract ratification far from the "core" of the RLA, they are outside its parameters entirely. *See, e.g., DeBoles v. Trans World Air Lines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977), *cert. den'd*, 434 U.S. 837 (1977)(it is because federal labor statutes do not address the question that the ratification of contracts is only required "if the union constitution or by-laws require it"); *White v. White Rose Foods*, 237 F.3d 174, 182 (2d Cir. 2001).

Equally to the point, *Garmon* is not a "conflict-of-law" rule. As this Court has made unmistakably clear, *Garmon* presents a "choice-of-forum rather than a choice-of-law question." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 381 n.9 (1986). Its purpose is to ensure that claims that should be submitted to the NLRB *are* submitted there, and it achieves that purpose by precluding other tribunals from exercising their jurisdiction. *See, e.g., Marquez v. Schreen Actor's Guild*, 525 U.S. 33, 49 (1998); *Golden Gate Trans. Corp. v. City of Los Angeles*, 493 U.S. 103, 111 n.7 (1989); *Beck*, 487 U.S. at 742; *Longshoremen v. Davis*, 376 U.S. 380, 391, 393 n.10 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Brown v. Hotel Employees*, 468 U.S. 491, 502-03 (1984); *Sears, Roebuck, supra*; *Jacksonville Terminal*, 394 U.S. at 382 n. 17;

Local 174, Teamster, Chauffeurs & Warehousemen v. Lucas Flour, 369 U.S. 95, 102 (1962); *Garmon*, 350 U.S. 236 (1959). Whether *Garmon* actually deprives them of "subject matter" jurisdiction or is simply a claims-processing rule is a question that need not detain us. In either event, its principal purpose and effect is to redirect litigants from one forum to another and not, as the Courts below believed, to require courts to *themselves* undertake an in-depth analysis of the interplay between state and federal law. The whole point of *Garmon* is that the task of evaluating and articulating the law is to be left to the specialized agency.

It follows that it makes absolutely no sense to apply *Garmon*, as the Courts did below, to circumstances in which the judicial forum is the *only* forum available. It cannot protect the jurisdiction of any forum under those circumstances; it can only deprive litigants of *any* forum for their claims.

C. On The Issue Of RLA Preemption, The Circuits Are Not Simply Divided They Are In Considerable Disarray.

There is no longer either unanimity or clarity on the question of which of this Court's decisions to apply in determining RLA preemption. Over the past ten years, there has been increasing divergence on the issue. *See, e.g., Lindsay*, Pet. App. 1-33 (2d Cir. 2009)(*Garmon* standard); *Wisconsin Cent. Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008)("field preemption"); *Bloemer v. Northwest Airlines, Inc.*, 401 F.3d 935 (8th Cir. 2005)(*Norris/Lingle* standard); *Bensel v. Allied Pilots' Ass'n*, 387 F.3d 298, 321 (3rd Cir.

2003)(*Garmon*); *McCormick v. Aircraft Mech. Fraternal Ass'n*, 340 F3d 642, 644-45 (8th Cir. 2003)(*Norris/Lingle*); *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001), *cert. den'd*, 535 U.S. 1034 (2002)(*Garmon* applied to preempt passengers' claims against union for damages resulting from job actions); *Air Transp. v. City & County of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001)(*Norris/Lingle*; *Machinists*); *Adames v. Executive Airlines, Inc.*, 258 F.3d 7 (1st Cir. 2001)(*Norris/Lingle*); *Brown v. Illinois Central*, 254 F.3d 654 (7th Cir.), *cert. den'd*, 534 U.S. 1041 (2001)(applies *Norris/Lingle* in preclusion context); *Fairbairn v. United Air Lines*, 250 F.3d 237 (4th Cir. 2001)(utilizing *Norris/Lingle* analysis, Circuit finds that RLA doesn't preempt claims arising under individual employment contracts); *Ertle v. Continental Airlines, Inc.*, 136 F.3d 690 (10th Cir. 1998)(*Norris*); *Espinal v. Northwest Airlines*, 90 F.3d 1452 (9th Cir. 1996)(*Norris/Lingle*); *Pyles v. United Airlines*, 79 F.3d 1046, 1050 (11th Cir. 1996)(*Norris/Lingle*); *Hirras v. Nat'l R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995)(*Norris/Lingle*); *Henegar v. Banta*, 27 F.3d 223, 226-227 (6th Cir.), *cert. den'd*, 513 U.S. 1057 (1994)(*Norris/Lingle*).

D. This Court's Intervention Is Necessary To Restore Order On This Issue. The Consequences Of Permitting This Circuit Split To Persist Are Dramatic And Dangerous.

In the final analysis, the decision below reads a preemption provision into the RLA that is not there in order to protect the jurisdiction of an agency that does not exist. It also alters traditional preemption analysis

by measuring the preemptive scope of one statute (the RLA) by the Congressional intent of a very different one (the NLRA). It then ignores the two prerequisites, established by myriad decisions of both this Court and ten sister Circuits, for applying the NLRA rule. Finally, it dispenses entirely with the third tier of the preemption analysis, stating, "actual conflict is not a prerequisite to finding a state claim preempted by the RLA." (Pet. App. 23).

As a practical matter, left to stand, the preemption doctrine applied below would radically affect employees' rights. **It would deprive employees covered by the Railway Labor Act of a right all other employees have: the right to enforce their union constitution.** Like the ruling on standing, the decision below on preemption means that employees covered by the RLA essentially have **no forum- state or federal, administrative or judicial- for the kind of claims raised here.** All they have is an illusory right to attempt to prove their union has been "wholly irrational." Should a court permit them to reach a jury on that claim, they would then have the right to attempt to obtain an uncollectible judgment.

Because here the Union Constitution clearly gave its members contract ratification and balloting rights, the Union abrogated its provisions, and the Airline contributed to and/or caused its breach, none of Petitioners' state-law claims is preempted. These claims are not covered by the RLA's lone and very limited express preemption provision, 45 U.S.C. § 152 Eleventh. The "field" they occupy- i.e., the field of internal union-employee relations- has not been "occupied" by the Railway Labor Act. And, as the

Second Circuit has tacitly acknowledged, there is no "actual conflict" between the "UC Claims" and any relevant federal law. (Pet. App. 23, 31n.6, 32n.8). They do not conflict with the RLA's substantive provisions, with DFR law, or the jurisdiction of any agency. To the contrary, they clearly fall outside *Norris/Lingle* since they do not require the interpretation of a collective bargaining agreement.

CONCLUSION

This case presents an ideal vehicle to resolve not only significant issues of statutory interpretation under the RLA, but issues of preemption at the heart of our federal system and the interpretation of Article III standing principles in the context of labor unions and their members. In addition to resolving contradictory rulings from different circuits and establishing a uniform set of principles for all to follow, the resolution of these issues would be of enormous practical importance to millions of working men and women and their families, as well as unions and employers under both the RLA and NLRA.

Petitioners respectfully request that the Court grant certiorari on all questions presented.

Respectfully submitted,

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(any footnotes trail end of each document)
08-4122-cv (L), 08-4128-cv (con), 08-4130-cv (con)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JILL LINDSAY, individually and on behalf of all others similarly situated, CAROL JOHNSON, CONSTANCE LAMATTINA, DANIEL SANTIAGO, DEBORAH WHITTINGTON, DOTTIE LONG, JANET GOLD, JUDITH ALEXANDER, KAREN RIVOIRA, LAURENCE E. SALOMON III, PATRICIA KENNEDY, PATTY GENTRY, REBECCA SMITH, Plaintiffs-Appellants,

-- v.--

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, a business entity of unknown type, AMR CORPORATION, a Delaware corporation, also known as American Airlines, AMERICAN AIRLINES, INC., also known as American Eagle, and JOHN WARD, Defendants-Appellees.

July 6, 2009, Argued
September 21, 2009, Decided

COUNSEL: EMILY M. BASS, Brooklyn, New York (Steven M. Nachman, New York, New York; Michael S. Haber, New York, New York; Martin Garbus, Davis & Gilbert, New York, New York, on the brief), for Plaintiffs-Appellants.

For STEPHEN B. MOLDOF (Michael L. Winston, Travis M. Mastroddi, on the brief), Cohen, Weiss and Simon LLP, New York, New York, for Defendants-

Appellees Association of Professional Flight Attendants and John Ward.

For THOMAS E. REINERT, JR. (Jonathan C. Fritts, on the brief), Morgan, Lewis & Bockius LLP, Washington, D.C., for Defendants-Appellees American Airlines, Inc. and AMR Corporation.

JUDGES: Before: RAGGI, HALL, Circuit Judges, and BIANCO, District Judge. *

REENA RAGGI, *Circuit Judge*:

Plaintiffs Jill Lindsay, Carol Johnson, Constance LaMattina, Daniel Santiago, Deborah Whittington, Dottie Long, Janet Gold, Judith Alexander, Karen Rivoira, Laurence E. Salomon III, Patricia Kennedy, Patty Gentry, and Rebecca Smith, proceeding individually, and in Ms. Lindsay's case, also on behalf of a putative class of flight attendants, filed suit in the United States District Court for the Eastern District of New York (Nina Gershon, *Judge*), challenging the validity of a Restructuring Participation Agreement reached between their former employer, defendants American Airlines and its parent AMR Corporation (collectively, "American Airlines"), and their union, defendant Association of Professional Flight Attendants, and its former president defendant John Ward (collectively, "APFA" or the "union"). Plaintiffs now appeal an award of summary judgment entered on July 22, 2008, in favor of American Airlines on plaintiffs' claims under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq.; in favor of American Airlines and APFA on plaintiffs' state law claims; and in favor of APFA on plaintiffs' claim of a breach of the duty of fair

representation. We conclude that plaintiffs' challenge fails because (1) the statutory sections relied on by plaintiffs to support their RLA claim, 45 U.S.C. § 152, First and Seventh, do not provide for a private cause of action; (2) the RLA preempts plaintiffs' state law claims; and (3) plaintiffs failed to adduce sufficient evidence of a material fact on their fair representation claim to defeat summary judgment.

Accordingly, we affirm the judgment of the district court in favor of defendants.

I. Background

The district court's thorough opinion fairly chronicles the complex events giving rise to defendants' Restructuring Participation Agreement, which plaintiffs challenge in this action. See *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 14130, 2006 WL 842888 (E.D.N.Y. 2006). We assume familiarity with that opinion, and we do not ourselves repeat the facts except as necessary to discuss plaintiffs' appeal of the award of summary judgment.

II. Discussion

A. Standard of Review

We review an award of summary judgment de novo, "construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009). Summary judgment may be granted only "if the pleadings, the discovery and disclosure materials on

file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law." *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d at 137.

B. Plaintiffs' Railway Labor Act Claims

Plaintiffs contend that American Airlines violated those provisions of the RLA codified at 45 U.S.C. § 152, First and Seventh by supplanting an existing collective bargaining agreement with the Restructuring Participation Agreement. Section 152, First states as follows:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First.

Section 152, Seventh states as follows:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its

> employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Id. § 152, Seventh.

No party has pointed us to any case law addressing whether these sections provide for a private right of action by individual employees, nor have we identified any. In considering this question of first impression, we begin by reviewing the general enforcement structure of the RLA.

1. Arbitral Resolution of Major and Minor Disputes Under the RLA

"The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148, 90 S. Ct. 294, 24 L. Ed. 2d 325 (1969); see also 45 U.S.C. § 181 (amending RLA to apply to interstate air carriers). Toward this end, the RLA provides an arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes between unions and employers. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (quoting 45 U.S.C. § 151a). The first class, referred to as "major" disputes, relates to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp.* v. *Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) (internal quotation marks omitted). The second class, known as "minor" disputes,

see *id.* at 303, "grow[s] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a(5). In other words, "major disputes seek to create contractual rights, minor disputes to enforce them." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. at 253.

2. Private Enforcement of the RLA

Beyond the arbitral scheme for resolving disputes between employers and unions, the RLA also provides for federal criminal enforcement. See 45 U.S.C. § 152, Tenth ("It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section."). Although the RLA does not explicitly provide a private civil cause of action, the Supreme Court has found such an action by a union implicit in the statutory scheme.

In Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steam ship Clerks, the Supreme Court recognized a private right of action by a union alleging that the defendant company was "interfering with, influencing, or coercing the clerical employees of the railroad company in the matter of their organization and designation of representatives" in violation of § 152, Third. 281 U.S. 548, 555, 50 S. Ct. 427, 74 L. Ed. 1034 (1930). The Court concluded that "Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought

it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." *Id.* at 567. In fact, private civil proceedings constitute the bulk of cases arising under the RLA. See *United States v. Winston*, 558 F.2d 105, 108 & n.3 (2d Cir. 1977) (noting "[t]he paucity of criminal proceedings under § 152, when contrasted with the active pursuit of civil relief thereunder").

Although much of the case law involving private causes of action under § 152 concerns claims brought by or against a certified union, our sister circuits have recognized an implied private right of action for individual employees against their employer under certain RLA provisions, notably § 152, Third and Fourth. See, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 318 (3d Cir. 2004) (collecting cases); *Fennessy v. Sw. Airlines*, 91 F.3d 1359, 1362-64 (9th Cir. 1996); *Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d 922, 927 (1st Cir. 1983). The Third Circuit explained that "[i]mplying a private cause of action for individual employees under 45 U.S.C. § 152, Third & Fourth is appropriate given that those sections prohibit carriers from discriminating against employees in connection with union organizing activities."[1] *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 318 (emphasis in original). By contrast, the Third Circuit declined to find an implied private cause of action for individual employees in § 152, Second and Ninth because, although the statute "may indicate a congressional intent to create a private cause of action for a duly certified representative that is injured pursuant to these provisions," that "does not imply that Congress intended to create a private right of action for any

group or groups of individual employees claiming to act on behalf of the relevant employees."[2] *Id.* at 319.

3. Section 152, First and Seventh Do Not Provide a Private Cause of Action

Against this background, we consider whether § 152, First or Seventh provides an individual employee with a private right of action against his employer. Because our task is to ascertain Congress's intent, we look first to the text and structure of the statute. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). If Congress has manifested no intent to provide a private right of action, we cannot create one. See id. We identify nothing in the RLA's text or structure suggesting Congress's intent to create a private remedy. We next proceed to consider "whether a private remedy is implicit in [the] statute." *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In undertaking this second inquiry, four factors guide our analysis:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (internal citations and quotation marks omitted).[3] For the reasons stated in the next three subsections of this opinion, we conclude that Congress did not intend to create a private cause of action for employees to enforce § 152, First or Seventh. The appropriate remedy for injuries of the sort plaintiffs allege is a claim against their union for breach of the duty of fair representation.[4]

a. Text and Structure

The text of § 152, First and Seventh reveals no congressional intent to create a private right of action. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. at 289 (internal quotation marks omitted); see also *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007) ("[T]he absence of 'rights-creating language' indicates a lack of congressional intent to create private rights of action."). Section 152, First imposes a "duty" on "all carriers, their officers, agents, and employees." Likewise, § 152, Seventh bars certain actions by a "carrier, its officers, or agents." Because both provisions focus on the regulated parties, we discern no intent to confer privately enforceable rights.

The statute's structure also supports this conclusion. As the Supreme Court has recognized, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. at 290. Here, Congress expressly contemplated that the RLA would be enforced through arbitral panels, see 45 U.S.C. § 184,

and criminal prosecution, see 45 U.S.C. § 152, Tenth.[5] Congress's failure to provide similarly for private enforcement signals caution in inferring any such right of action. The prior implication of private rights under other subsections of 45 U.S.C. § 152 warrants no different conclusion. Indeed, Sandoval involved Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. In an earlier Title VI case, the Court had noted that private plaintiffs could sue under § 601. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). Nevertheless, that consideration was not relevant to Sandoval's textual and structural analysis of whether § 602 created a similar private remedy. We therefore conclude that the RLA's text and structure does not manifest Congress's intent to create a private enforcement mechanism for all provisions of the statute.

b. Section 152, First

Our analysis of the four Cort v. Ash factors bolsters this conclusion. The statutory requirement in § 152, First that carriers strive to "maintain agreements concerning rates, rules, and working conditions," may well benefit individual employees, the first relevant factor under *Cort v. Ash*, 422 U.S. at 78. This is not sufficient, however, to imply a private right of action because the statutory scheme achieves its purpose by collectivizing employees' individual interests. See *NLRB v. Allis-Chalmers Mfg. C o.*, 388 U.S. 175, 180, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967) (noting that "majority-rule concept is today unquestionably at the center of our federal labor policy" (internal quotation marks omitted)). Thus, § 152, First is distinguishable from § 152, Third and Fourth, for which private rights

of action have been recognized, in that the latter provisions are specifically aimed at preventing employer interference with individual employees' ability to join a collective bargaining scheme. With that interest protected, however, Congress clearly intended that individual preferences give way to the collective position embodied by the certified union representative. It is agreements reached by such representatives with employers that are the focus of § 152, First. See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548, 57 S. Ct. 592, 81 L. Ed. 789 (1937) (observing that § 152, First is concerned with negotiations between an employer and the "authorized representative of its employees").

Indeed, the second Cort v. Ash factor signals that Congress did not intend to provide a private cause of action for individual employees in § 152, First. See 422 U.S. at 78. Section 152, Second states that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." 45 U.S.C. § 152, Second (emphasis added). Section 152, Fourth explains that the very "right to organize and bargain collectively" is accomplished "through representatives of [the employees'] own choosing." 45 U.S.C. § 152, Fourth (emphasis added). That provision further states that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." Id. Taken together, these provisions leave no doubt that, where, as here, a "craft or class of

employees" has selected a representative union, Congress intended the power to "make" and the duty to "maintain agreements concerning rates of pay, rules, and working conditions," id. § 152, First, to run between the representative union and the company. Indeed, the Supreme Court has explained that "members [of a craft or class] cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200, 65 S. Ct. 226, 89 L. Ed. 173 (1944); see also *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. at 548.

Relatedly, we conclude under the third *Cort v. Ash* factor that it would not be consistent "with the underlying purposes of the legislative scheme" to imply a private cause of action for employees under § 152, First. By its terms, § 152, First links its requirement to make and maintain agreements to the larger RLA purpose "to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152, First; see also id. § 151a(1). As described above, the statute seeks to achieve this goal by vesting collective bargaining authority in representative unions. The Supreme Court has explained that, in enacting the RLA, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty." *Steele v. Louisville & N.R. Co.*, 323 U.S. at 202. As such, the RLA is consistent with a

> [n]ational labor policy . . . built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 180. The union's ability to exercise this vested authority is protected by the RLA. At the same time, it is the union's "corresponding duty" to those it represents that ensures the fair exercise of this authority. *Steele v. Louisville & N.R. Co.*, 323 U.S. at 202. It could not be otherwise in a statutory regime that prioritizes continuity and "majority-rule" over the "complete satisfaction of all who are represented." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

The facts of this case demonstrate why individual employee actions under § 152, First would be inconsistent with a statutory scheme embodying these principles. The Restructuring Participation Agreement, which plaintiffs complain fails to maintain a 2001 collective bargaining agreement ("CBA"), was agreed to by APFA on April 8, 2003, and approved by APFA 's members on April 16, 2003. In that document, "the parties agree that the 2001 CBA shall remain in full force and effect except as modified herein." Among the modifications here at issue was the date for possible amendment of the CBA, with the union and its

membership agreeing to an extension from November 30, 2004, to April 30, 2009. Following the disclosure of the Special Executive Retirement Plan on April 17, 2003, the union extracted a concession from American Airlines on the point, making the 2001 CBA amendable one year earlier, on April 30, 2008.

However dissatisfied individual employees may be with these modifications to the 2001 CBA, allowing them to sue American Airlines under § 152, First to set aside a Restructuring Participation Agreement agreed to by their union representative and ratified by the union membership would risk the very disruption in commerce that the RLA seeks to avoid. Indeed, under the agreed-to modifications, American Airlines cannot simply revert to the original terms of the 2001 CBA. Plaintiffs' dispute is thus not with American Airlines, which could not take the action plaintiffs seek without violating the modified CBA, but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim. A claim of this nature is appropriately brought against the union for breach of the duty of fair representation. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation."); see also infra [25-31] (discussing plaintiffs' duty of fair representation claim).

c. Section 152, Seventh

The statutory provision prohibiting carriers from changing "rates of pay, rules, or working conditions"

except as prescribed by agreement or statute, 45 U.S.C. § 152, Seventh, may also benefit employees, but here too we do not recognize an implied private right of action by individual employees against an employer.

As the Supreme Court has observed, the purpose of § 152, Seventh is twofold: "it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. at 156. Thus, § 152, Seventh is a "status quo" provision, requiring "that parties to a CBA governed by the RLA maintain objective working conditions during the pendency of any dispute arising under (or during the re-negotiation of) their CBA." *In re Nw. Airlines Corp.*, 483 F.3d 160, 167 (2d Cir. 2007). More specifically, in the event of a "major dispute," § 152, Seventh preserves the status quo while the employer and the union engage in the negotiation required by 45 U.S.C. §§ 155 and 156. See *Consolidated Rail Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. at 302-03.

Precisely because the statutory scheme as interpreted by the courts recognizes the representative union as the proper party to invoke § 152, Seventh, we conclude that the second and third Cort v. Ash factors weigh heavily against recognition of a private right of action by individual employees. See 422 U.S. at 78. The provision is only implicated where a "craft or class" of employees has already selected a representative to bargain collectively on its behalf, 45 U.S.C. § 152, Fourth, and where an employer attempts to make changes that affect the employees "as a class," § 152, Seventh. Under those circumstances, an individual

employee's "power to order his own relations with his employer" is "extinguishe[d]" in favor of "a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

Because we conclude that neither § 152, First nor § 152, Seventh provides a private cause of action to individual employees against their employers under the circumstances presented here, we affirm the district court's dismissal of these claims and its entry of judgment in favor of defendants.

C. Plaintiffs' State Law Claims

Plaintiffs assert that the district court erred in concluding that their state law claims against American Airlines were preempted by the RLA. See *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 14130, 2006 WL 842888, at *7. In their reply brief, plaintiffs clarify that they appeal only the dismissal of (1) Claim Eleven, in which they charge APFA with breach of its contractual relationship with plaintiffs as set forth in the union's constitution and bylaws; (2) Claim Twelve, in which they charge American Airlines with intentional interference with the contractual relationship between APFA and its members; and (3) Claim Sixteen, in which plaintiffs charge American Airlines with intentionally causing APFA to breach certain provisions of its constitution and bylaws relating to balloting and electioneering practices. Accordingly, we limit our discussion to those claims. See *Maloney v. Cuomo*, 554 F.3d 56, 58 n.2 (2d Cir. 2009) (noting that claims not pursued on appeal are deemed waived). Like the district court, we conclude

that these claims are preempted by the RLA, and we therefore affirm their dismissal.

1. Preemption in Labor Cases Generally

The Supreme Court established the basic tenets of federal preemption in the labor context in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). In Garmon, the Court considered whether California could provide damages under state law to an employer based on employee picketing, which the California Supreme Court determined was an unfair trade practice. See *id.* at 238-39. The employer had begun a simultaneous proceeding before the National Labor Relations Board ("NLRB"), over which the Regional Director had declined to exercise jurisdiction "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.* at 238.

The Court identified the issue as "[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule," namely, the National Labor Relations Act. *Id.* at 241. The Court concluded as follows:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations A ct, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of

> conflict between power asserted by Congress and requirements imposed by state law.

Id. at 244. Stated differently, "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246. This principle, the Court explained, applies regardless of whether the state law at issue was "tort law of general application [or] specialized labor relations statutes." *Id.* at 244 n.3. Finally, the Court explained that, even if application of state law in a particular situation would not, in fact, conflict with "the active assertion of federal authority," it would nevertheless "involve[] a conflict with federal policy in that it involves allowing two law-making sources to govern." *Id.* at 247.

The Garmon rule is subject to two exceptions. First, states retain power to regulate activity that is "a merely peripheral concern of the Labor Management Relations Act." *Id.* at 243. Second, federal labor law does not preempt state law where "the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244. As an example of the second exception, the Court pointed to states' continued ability to regulate "violence and imminent threats to the public order." *Id.* at 247.

2. Preemption in RLA Cases

Although Garmon was decided in the context of the National Labor Relations Act, similar reasoning animated the Supreme Court's application of preemption to the Railway Labor Act in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969); see, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 321 (suggesting that Garmon was "extended" to the RLA in Jacksonville Terminal). In Jacksonville Terminal, the Court considered whether, in the context of a "major" labor dispute governed by the RLA, a Florida court had the authority to enjoin the picketing of a freight rail terminal facility under state tort and labor laws. 394 U.S. at 372-77. The Court concluded that it did not because "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [RLA's] processes." *Id.* at 380. The Court reached this conclusion even while acknowledging that, unlike the situation presented in Garmon, in a major dispute under the RLA there is "no administrative agency equivalent to the NLRB with jurisdiction over railway labor disputes." *Id.* at 384 n.19.

In the years since Jacksonville Terminal and Garmon were decided, this and other circuits have applied their reasoning to major RLA disputes, see, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 320-23 (applying Garmon and Jacksonville Terminal to RLA major dispute and affirming dismissal of, inter alia, tortious and malicious interference, fraudulent misrepresentation, and breach of contract claims); to minor RLA disputes, see, e.g., *Beers v.S.Pac. Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983) (holding that intentional infliction of emotional distress claim brought in context of "minor" RLA dispute was preempted

under Garmon); and to RLA issues, like those presented here, not falling squarely within either category, see, e.g., *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 202-03 (5th Cir. 2001) (applying Garmon to hold third-party tortious interference claim preempted by RLA); *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001) (noting that "[s]tate laws that frustrate the purpose of the RLA are preempted"); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170-71 (4th Cir. 1985) (holding that RLA preempts state law claim for wrongful discharge even where RLA arbitral mechanism not implicated because "state claims seek to vindicate rights largely secured by federal law"); cf. *Delta Air Lines v. Kramarsky*, 650 F.2d 1287, 1301-02 (2d Cir. 1981) (applying Garmon analysis to claim that New York Disability Benefits Law ("DBL") was preempted by RLA, and holding that because DBL "governs matters outside the intended reach of the RLA . . . the RLA therefore does not preempt the DBL"), vacated in part on different grounds on rehearing by 666 F.2d 21, 26 (2d Cir. 1981), affirmed in part and vacated in part on other grounds by *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 92 n.8, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (noting that Second Circuit resolved RLA preemption claim against Delta, but that claim was not before Supreme Court).

Contrary to plaintiffs' assertion, these cases demonstrate that the principles animating *Garmon*, *Jacksonville Terminal*, and their progeny are applicable to plaintiffs' state law claims. Underlying these principles is a concern with whether the particular state law at issue may "stand[] as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Accordingly, courts have invoked Garmon to preempt certain state law causes of action even where the RLA claim at issue is not subject to the exclusive primary jurisdiction of the National Railroad Adjustment Board ("NRA B"). See 45 U.S.C. § 153; *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959) (discussing exclusive primary jurisdiction of NRAB over minor RLA disputes). Similarly, courts have applied Jacksonville Terminal to preempt more than just those state law claims that attempt "to regulate economic warfare between disputants subject to the [RLA's] processes." See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380. Although expansive views of the preemption doctrine have not escaped criticism, see *Wyeth v. Levine*, 129 S. Ct. 1187, 1211, 173 L. Ed. 2d 51 (2009) (Thomas, J., concurring), we need not here reach the outer boundaries of the doctrine to conclude that the maintenance of plaintiffs' state tort claims "would frustrate effective implementation of the [RLA's] processes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380.

3. Claims Eleven, Twelve, and Sixteen Are Preempted by the RLA

Claims Twelve and Sixteen allege that actions of American Airlines in negotiating the Restructuring Participation Agreement caused APFA to breach its contractual duties to its members, see Compl. ¶¶ 304-07, 325-35, while Claim Eleven alleges that APFA breached its contract with its members in the course of negotiating and ratifying the Restructuring

Participation Agreement, see id. ¶ ¶ 299-303. These claims are akin to those discussed by the Third Circuit in Bensel v. Allied Pilots' Association:

> [A]ll involve alleged interference with [plaintiffs'] employment rights as established by the various agreements that govern their wages and other benefits as well as their right to be fairly represented under [§ 152]. Thus the . . . rights at issue are founded upon federal law, derive their strength and protection from federal law, and exist to effectuate a nationwide federal labor policy.

387 F.3d at 321. Such claims must rise or fall based on their merit under the RLA.[6]

Parties whose conduct is governed by the RLA approach collective bargaining negotiations mindful of the incentives and penalties set forth in the Act. As in Jacksonville Terminal, the imposition of additional state regulation on core RLA conduct would alter the balance struck by Congress in this regard. See 394 U.S. at 381. "[T]he potentials for conflict, and for the imposition of inconsistent state obligations, are simply too great" to allow each state to regulate conduct central to Congress's RLA goals. Id. (internal citations omitted). This task "'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.'" Id. (quoting *International Ass'n of Machinists AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 691-92, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963)). We easily conclude that the

imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the "balance of power" established by the RLA, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986), and "frustrate effective implementation of the [Act's] processes," *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380.

Plaintiffs submit that there is, in fact, "no conflict" between their state common law claims and the RLA. Appellants' Br. at 37. The point requires little discussion. In Garmon, the Supreme Court observed that, even if application of state law "in a particular situation will not, in fact, conflict with the active assertion of federal authority," the state claim is nevertheless preempted because "two law-making sources" may not govern labor policy. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. at 247. Similarly, in Jacksonville Terminal, the Court held the state regulation preempted not because it actually conflicted with the RLA, but because of the "potentials for conflict" that would arise if each state were entitled to set its own standard. 394 U.S. at 381. In sum, actual conflict is not a prerequisite to finding a state claim preempted by the RLA.

Plaintiffs have failed to offer any compelling argument as to why their state law claims are not governed by the well-settled line of precedents deriving from Garmon and Jacksonville Terminal.[7] Nor have plaintiffs attempted to demonstrate that either of the exceptions recognized in Garmon applies to their claims. Accordingly, we conclude that the district court

correctly dismissed Courts Eleven, Twelve, and Sixteen as preempted by the RLA.[8]

D. Plaintiffs' Claim of a Breach of the Duty of Fair Representation

Plaintiffs submit that the district court erred in granting summary judgment in favor of APFA on the claim of a breach of the union's duty of fair representation. We disagree.

1. The Duty of Fair Representation Under the RLA

"The statutory duty of fair representation was developed [in the 1940s] in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In these cases, the Supreme Court ruled that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Id.; see *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 276 -77 (2d Cir. 2004). This "tripartite standard" applies to "'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well,'" i.e., to both "major" and "minor" disputes under the RLA. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 77, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (quoting *Communications*

Workers v. Beck, 487 U.S. 735, 743, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988)).[9]

The Supreme Court has emphasized that a court's "substantive examination of a union's performance [is] highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. at 78. "For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." Id. (internal citation and quotation marks omitted). The rationality of a union's decision must be evaluated "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." Id. To demonstrate "bad faith" representation by a union, a party must show "improper intent, purpose, or motive." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998) (observing that "[b]ad faith encompasses fraud, dishonesty, and other intentionally misleading conduct"). Even if a party makes such a showing, it must further demonstrate a causal connection between the union's misconduct and the complained-of injury. *Id.*

2. Plaintiffs' Failure To Adduce Evidence of Irrational or Arbitrary Conduct

Plaintiffs point to numerous decisions taken by APFA in its negotiations with American Airlines that they submit raise triable issues of fact as to the irrationality and arbitrariness of the union's representation. See Fed. R. Civ. P. 56(c). We consider each in turn and conclude that plaintiffs' argument is without merit.

At the outset, we note that the record is replete with evidence that American Airlines was, in fact, in dire economic straits at the time the parties entered into the negotiations that led to the Restructuring Participation Agreement. For example, American Airlines had a net loss of $ 3.5 billion in 2002, and by 2003 the airline was experiencing cash losses of approximately $ 5 million per day. Further, two of American Airlines' primary competitors, US Airways and United Airlines, had filed for bankruptcy protection in August 2002 and December 2002, respectively. These circumstances preclude any reasonable factfinder from concluding that APFA entered into the challenged negotiations with American Airlines irrationally, arbitrarily, or in bad faith.

Nor will the evidence admit an inference of arbitrariness or bad faith in the voting procedures used by APFA in seeking membership ratification of the Restructuring Participation Agreement. Plaintiffs take issue with the union's use of a telephonic balloting service provided by American Airlines rather than mail-in balloting, and with the use of a password supplied by American Airlines to monitor such balloting. Given the time-sensitive nature of the circumstances, APFA's reliance on telephonic balloting and its monitoring of the vote through a website established by American Airlines is insufficient, by itself, to permit a finding of bad faith.

Plaintiffs suggest that a jury could infer APFA's bad faith from its agreement to a ratification voting deadline of April 15, 2003, two days before American Airlines filed its 10K form revealing the terms of a Special Executive Retirement Plan. Plaintiffs failed,

however, to adduce any admissible evidence supporting their conclusory assertion that APFA officials knew of the retirement plan when they agreed to the voting schedule. Indeed, plaintiffs do not address testimonial evidence that APFA officials did not have any notice of the retirement plan until its public disclosure on April 17. This record is insufficient to demonstrate a genuine dispute of material fact warranting trial. See Fed. R. Civ. P. 56(c).

Plaintiffs further submit that APFA's decisions to extend the voting deadline to April 16 and to permit members to change votes were taken in bad faith. Once again, plaintiffs make a bald assertion -- that "the principal, or sole, reason APFA did so was to reverse the [initial negative] outcome," Appellants' Br. at 42 -- without pointing to any supporting admissible evidence. In fact, the record evidence demonstrates that APFA sought an extension through the end of April to provide its members with more time to consider the terms of the Restructuring Participation Agreement and to accommodate certain members who had had trouble casting votes. It was American Airlines that refused to agree to such an extension and, on April 15, offered the alternative of one further day of voting. There is no record evidence that would permit a factfinder to identify bad faith in APFA's acceptance of the one-day extension. See generally *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988) (finding no breach of the duty of fair representation where union urged ratification of collective bargaining agreement because it 'accurately reflected its negotiation efforts with the Company and the economic crisis in the steel industry").

Like the district court, we also identify no record

support for plaintiffs' claim that APFA acted arbitrarily or in bad faith in finalizing the April 25, 2003 acceptance of a modified Restructuring Participation Agreement. Following disclosure of the Special Executive Retirement Plan, on April 22, 2003, APFA determined that the Restructuring Participation Agreement was no longer valid and would have to be put to a re-vote. The next day, a four-person congressional delegation met with various American Airlines officials, including CEO Donald Carty, APFA head John Ward, and the heads of two other unions that had ratified the Restructuring Participation Agreement. As a result of those discussions, American Airlines unilaterally acceded to several APFA demands, including a one-year reduction in the duration of the Restructuring Participation Agreement, an option for the union to reopen that Agreement after three years, and an "Annual Incentive Program." Plaintiffs do not dispute that these concessions benefitted APFA members. As a result of these discussions, American Airlines CEO Carty also resigned.

APFA leaders met with the new American Airlines CEO, Gerard Arpey, on April 24, 2003. The union requested that the airline defer filing for bankruptcy until after the re-vote, and it sought an additional amendment to the "underfly" provision of the Restructuring Participation Agreement. American Airlines agreed to remove the "underfly" provision and to substitute a different concession of equal value in its place, but it informed APFA that, if it did not finalize the Restructuring Participation Agreement by April 25, the airline would declare bankruptcy. The APFA Board of Directors considered this proposal and, on

April 25, finalized the agreement. This record provides no support for plaintiffs' assertion that APFA's actions were "so far outside a wide range of reasonableness" as to be irrational. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. at 78 (internal quotation marks omitted).

Accordingly, we conclude that summary judgment was appropriately entered in favor of APFA on plaintiffs' claim of breach of the duty of fair representation.

III. Conclusion

To summarize, we conclude as follows:

1. Plaintiffs' RLA claims against American Airlines pursuant to 45 U.S.C. § 152, First and Seventh were properly dismissed because those provisions do not provide a private cause of action for an employee against an employer.

2. Plaintiffs' state law claims against American Airlines and APFA for breach of contract and intentional interference with contract were properly dismissed because these state law claims are preempted by the RLA.

3. Summary judgment was properly entered in favor of APFA on plaintiffs' claim of breach of the duty of fair representation because plaintiffs failed to adduce evidence raising a colorable question of fact on the issue of whether APFA's actions were so far outside a wide range of reasonableness as to be wholly irrational, arbitrary, or undertaken in bad faith.

Accordingly, the judgment of the district court in favor of defendants is AFFIRMED

Footnotes

*Judge Joseph F. Bianco, of the United States District Court for the Eastern District of New York, sitting by designation.

1Section 152, Fourth instructs that an employer may not "deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees." 45 U.S.C. § 152, Fourth. Section 152, Third instructs that neither labor nor management may "interfere with, influence, or coerce the other [party] in its choice of representative." 45 U.S.C. § 152, Third.

2Section 152, Second instructs that all disputes between a carrier and its employees "shall be considered, and, if possible, decided . . . in a conference between [designated] representatives." 45 U.S.C. § 152, Second. Section 152, Ninth instructs the Mediation Board to resolve disputes "as to who are the [designated] representatives." 45 U.S.C. § 152, Ninth.

3We have expressed some doubt about whether, in light of more recent cases, we may still imply a private right of action based on the Cort v. Ash factors. See *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 (2d Cir. 2002) (noting that, after Cort v. Ash, the Supreme Court "focused the analysis on the single question of whether congressional intent

to create a private cause of action can be found in the relevant statute"); *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 434 (2d Cir. 2002) (noting that recent Supreme Court decisions have "subordinat[ed the Cort v. Ash factors] to statutory text"). Sandoval, however, does not purport to overrule *Cort v. Ash*. Accordingly, we apply these factors to illuminate our analysis of congressional intent.

4We discuss plaintiffs' claim against APFA for breach of the duty of fair representation infra at [25-31].

5The RLA provides for criminal enforcement of § 152, Third, Fourth, Fifth, Seventh, and Eighth -- not § 152, First. See 45 U.S.C. § 152, Tenth.

6We note, with respect to plaintiffs' breach claim against APFA, that plaintiffs have alleged no independent duty owed them individually under the contract. See *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990) ("If an employee claims that a union owes him a more far-reaching duty [than the duty of fair representation], he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees."); see also *May v. Shuttle, Inc.*, 129 F.3d 165, 179, 327 U.S. App. D.C. 82 (D.C. Cir. 1997) (holding RLA duty of fair representation claim preempts "identical" state law claims of fraud and deceit); *Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50, 51 (4th Cir. 1994) (same); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170 (4th Cir. 1985) (noting that state law tort claims were "essentially identical" to duty of fair representation

claim and therefore dismissing state claims as preempted by RLA).

7Plaintiffs cite several non-RLA cases to support their contrary argument, none of which is relevant to our analysis. See, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002) (construing the express preemption clause of the Federal Boat Safety Act of 1971 and concluding that it does not preempt common law claims); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (construing the express preemption provision of the Medical Device Amendments of 1976); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (construing preemption provision of National Traffic and Motor Vehicle Safety Act of 1966 and concluding that it did not preempt common law claim on issue for which federal law provided no standard).

8Plaintiffs also argue that the district court erred in concluding that the APFA constitution is not enforceable as a contract. The court held no such thing. Indeed, the court had no need to determine whether the constitution was enforceable as a contract because it dismissed the contract claim on a different ground, i.e., that "[t]he allegations underlying plaintiffs' claim for "breach of the union constitution" are, in substance, identical to those in plaintiffs' DFR [duty of fair representation] claims" and are therefore preempted by the RLA. *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 55751, 2008 WL 2828599, at *26. Because we affirm on that same ground, we need not address the enforceability issue.

9The district court properly identified this tripartite standard and fairly applied it in thoroughly reviewing the evidence relevant to plaintiffs' fair representation claim. See *Marcoux v. Am. Airlines, Inc.*, 2008 U.S. Dist. LEXIS 55751, 2008 WL 2828599, at *22-26. Thus, there is no merit to plaintiffs' argument that the award of summary judgment on this claim was infected by application of an incorrect legal standard. In any event, we review the challenged judgment de novo and conclude for ourselves that judgment was properly entered in favor of APFA.

04 CV 1376 (NG)(KAM),03 CV 4987 (NG)(KAM),04 CV 634 (NG)(KAM)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

ANNE M. MARCOUX, JILL LINDSAY, KIRSTEN EVANS, CONSTANCE LaMATTINA, ELIZABETH LEE PRICE, JUDITH ALEXANDER, DEBORAH DEAN, CHRISTINA FORD, PATTI GENTRY, LaTONYA K. GILLMORE, JANET GOLD, DALE HAGAR, JULIE HORAN, LOUIS HORTER, CAROL JOHNSON, MOLLY KAIMAN, BEVERLEY KALKHOF, NANCYANNE KELLO, PATRICIA KENNEDY, JANET KIRBY, JOHN KLINE, DOTTIE LONG, KAREN RIVOIRA, LAURENCE E. SALOMON III, DANIEL SANTIAGO, REBECCA SMITH, and DEBORAH WHITTINGTON on Behalf of themselves and all others similarly situated (i.e., the "Class"); CONSTANCE LaMATTINA also on behalf of Subclass I, KIRSTEN EVANS, JILL LINDSAY and ELIZABETH LEE PRICE also on Behalf of Subclass II; DEBORAH WHITTINGTON also on Behalf of Subclass III, and JANET KIRBY also on Behalf of Subclass IV,

Plaintiffs,

-against-

AMERICAN AIRLINES, INC., A.M.R. CORPORATION, ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, and JOHN WARD, as President of Association of Professional Flight Attendants,

Defendants.

July 22, 2008, Decided
July 22, 2008, Filed

OPINION AND ORDER

GERSHON, United States District Judge:

Plaintiffs bring this action against Defendants American Airlines, Inc. ("American," or the "Company"), A.M.R. Corporation ("AMR" or, together with American, the "Company Defendants"), the Association of Professional Flight Attendants ("APFA" or the "Union"), and John Ward, in his capacity as President of APFA ("Ward," also included in "APFA" or the "Union"). In light of this court's previous Order, *see Marcoux v. Am. Airlines, Inc.*, 2006 U.S. Dist. LEXIS 14130 (E.D.N.Y. March 28, 2006), remaining against Company Defendants are hybrid claims for breach of the duty of fair representation ("DFR") and violations of the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*; remaining against APFA are claims for breach of the DFR and breach of the APFA constitution.

All defendants move for summary judgment dismissing the remaining claims. Plaintiffs move for class certification and for summary judgment on all claims except the claim against APFA for breach of the APFA constitution. For the reasons set forth below, the motions for summary judgment filed by Company Defendants and APFA are granted in their entirety; plaintiffs' motion for summary judgment is denied, and their motion for class certification is denied as moot.

FACTS

Unless otherwise indicated, the facts set forth below are undisputed. American is a "carrier by air" within the meaning of the RLA, 45 U.S.C. § 181. AMR is the publicly-traded parent company of American. At all pertinent times, APFA was the certified and exclusive representative of the class of flight attendants employed by American and is a "labor organization" within the meaning of the RLA. Ward served as President of APFA from April 2000 through August 2004. At all pertinent times, plaintiffs were members of APFA.

I. The 2001 Collective Bargaining Agreement and Events Leading to Negotiation of the Restructuring Participation Agreement

A. Collective Bargaining Between APFA and American Between 1998 and 2001

Between 1998 and 2001, APFA and American engaged in Section 6 negotiations under RLA, 45 U.S.C. § 156. [1] In June 2001, on the last day of the "cooling-off" period, APFA and American reached a tentative agreement on the terms of a new Collective Bargaining Agreement (the "2001 CBA" [2]). The tentative agreement provided "industry-leading wages" and working conditions and was ratified by a 96% affirmative vote of the APFA membership, tabulated on September 12, 2001. The CBA was to continue until becoming "amendable" on November 30, 2004. [3] Early in 2001, as part of what would come to be known as the "turnaround plan," American responded to financial difficulties by altering

its business plan to remain competitive with low-cost carriers.

B. September 11, 2001

As a result of the terrorist attacks of September 11, 2001, the major airlines suffered billions of dollars of losses. American's net loss in 2002 was $ 3.5 billion and it projected an additional loss of $ 1 billion in the first quarter of 2003.

Thus, in 2002, after comparing its labor costs to those of its competitors, American developed a cost-cutting strategy relating to its pilots, mechanics, flight attendants, and other non-labor sources. American decided it needed to cut labor costs associated with the flight attendant group by $ 340 million annually to remain competitive. It also identified $ 2 billion in annual cost reductions that could be obtained through sources other than labor. Notwithstanding these cost-cutting plans, American, during this period, funded a retirement plan providing bankruptcy-protected pension benefits to senior officers. *See below* Facts § IV.

By letter dated December 6, 2002 from American's then-CEO, Don Carty ("Carty"), and its then-President, Gerard Arpey ("Arpey"), American requested that APFA, as well as the Allied Pilots Association ("APA"), and the Transport Workers Union ("TWU"), the bargaining representative for the Company's mechanics and other ground employees, agree to forgo two upcoming compensation increases provided under the 2001 CBA, namely, a 3% pay increase scheduled to take effect January 1, 2003, and a further increase scheduled

to take effect in July 2003. American recognized at the time that, even if APFA agreed to the requested concessions, American's economic turnaround would not be complete. American stated that the concessions were non-negotiable.

In response to American's December 2002 request to forgo pay increases, APFA informed the Company that it would conduct a detailed review of the Company's finances to determine if there was a legitimate need for the relief American sought. APFA retained Mark King as a financial advisor to assist with its review of American's finances. King had assisted the APFA Negotiating Committee in the negotiations that led to the 2001 CBA. By January 1, 2003, however, APFA's financial review had not yet concluded, and the Company implemented the 3% pay increase as required under the 2001 CBA.

C. American's Requests for Labor Concessions and APFA's Initial Response

The Company's financial condition declined in the first quarter of 2003 to a greater extent than previously projected. American was losing cash from operations at the rate of approximately $ 5 million per day -- nearly $ 7.5 million per day if capital expenditures and debt service were included, and between $ 14 and $ 21 million per day if pension contributions were included.
In early February 2003, the Company made additional demands for cost-saving contractual concessions from each of its unions, including APFA. Specifically, it demanded $ 1.6 billion in annual "permanent" labor cost reductions, i.e., cost savings of $ 1.6 billion per year on an ongoing basis, from APFA, the APA, and TWU. Of

this amount, the Company indicated that $ 340 million annually would be required from the flight attendant workforce.

Soon after APFA received American's February 2003 demand for concessions, Ward convened a meeting of the APFA Board of Directors ("BOD") on February 11-12, 2003. [4] The BOD "received a thorough briefing and analysis from [its] . . . advisors and a presentation from the APFA Negotiating Committee." Ward Dep. 257-58.

On February 12, 2003, the BOD adopted a resolution stating that

> APFA is committed to the survival of the Company and recognizes the importance to the membership of taking appropriate steps to ensure that the Company is a viable and successful entity which, at the same time, respects the needs and legitimate rights and expectations of its employees and specifically of the American . . . flight attendants.

It further provided for "a comprehensive, multi-faceted plan of action" designed to continue APFA's financial analysis of the Company and prepare for concessionary negotiations that might ensue. The BOD directed "the Negotiating Committee, under the direction of the APFA President, . . . to take all necessary action . . . to be able to expeditiously address varying contingencies." *Id.* The BOD's "overriding obligation was to . . . best protect the interests of the Flight Attendants." President's Report, Ward Ex. 10.

D. Risk of Bankruptcy

In late February or early March 2003, American CEO Carty informed APFA, at a special APFA BOD meeting, that American would file for bankruptcy protection unless it obtained an agreement from APFA by March 31, 2003 that provided the $ 340 million in annual cost reductions that American was demanding. American set the same deadline for APA and TWU to reach agreements, in the absence of which the Company would file for bankruptcy.

The APFA BOD met again in the second week of March 2003. At that meeting, it adopted a Resolution dated March 10, 2003 stating, "the best interests of the membership will be served by taking all appropriate action to expeditiously address the Company's financial situation," and directing APFA President Ward and the APFA negotiating team and advisors "to take any and all actions needed to reach a negotiated consensual agreement with American . . . in order to avoid bankruptcy." The BOD adopted this Resolution after receiving "presentations regarding the Company's financial situation and the time constraints from APFA's outside economic consultant, . . . APFA's Standing Negotiating Team," and "representatives of TWU, APA and American Airlines concerning the validity of the [Company's] request [for concessions] . . . ."

To assist APFA in its dealings with American, APFA retained, in addition to King, Leon Potok (another financial advisor), to further assess the Company's financial situation. APFA's advisors reviewed publicly available information and information provided by the Company, consulted with advisors retained by APA and TWU, and conferred with APFA's Negotiating

Team, the Union's Officers, and Company representatives. American "made its financial plans and backup information available to [APFA] and to [its] financial advisors . . . to a far greater extent than it ever had done before." President's Report, Ward Ex. 10. [5]

On February 11, 2003, King advised the APFA negotiating team in a power point presentation that the relief APFA should grant the company should be of a short-term nature because American faced a short-term cash problem. He further advised APFA that, because American was forecasting improvement, "it would be desirable to wait until May or June to determine whether cash relief is needed." King Dep. 65-66. However, in March 2003, King revised earlier evaluations and concluded that American's financial situation was deteriorating faster than he had previously believed, although he "never completely agreed with the company's position that it was deteriorating as quickly as it said it was." *Id.* at 144-45. Potok reached the conclusion that American's requests for financial concessions were warranted. At his deposition, he explained his conclusion:

> The company had lost significant amount of money, it was projecting to lose a significant amount of money, it was not simply a cyclical problem they were facing, it was structural, they had to address, as did the other main line airlines, and in the absence of fixing their problems no prudent management or board would continue coasting along throwing money out the windows.

Potok Dep. 212-13. He recalled that, in March of 2003, he advised APFA with regard to whether the management of American had a basis for seeking Chapter 11 bankruptcy protection:

> The company was seeking to get cost reductions in a time when it was in a negative cash flow, projected negative cash flow situation. And in the absence of such cost savings and in the absence of a deal with labor, it was reasonable to expect that the company would file for Chapter 11.

Id. at 37. Based on the analysis and presentation of APFA's financial advisors, APFA's leadership concluded that American's threats to file for bankruptcy in the absence of concessions were serious.

II. March 2003 APFA-American Discussions Lead to a Tentative Agreement

A. The APFA-American Discussions

In March 2003, American advised APFA that, if the Company filed for bankruptcy, it intended to reduce its aircraft fleet by 85 to 90 planes, with the consequence that at least 2,500 flight attendants would be furloughed over and above the furloughs that would result from implementation of the $ 340 million concessionary agreement. Also, in bankruptcy, American would seek at least an additional $ 130 million a year in cuts above the concessions it was seeking out of bankruptcy and lay off substantially more employees. These additional concessions would have been required to offset the substantial costs associated with

bankruptcy. The Company communicated both privately and publicly to the three unions that it was prepared to file for bankruptcy on March 31, 2003.

During these discussions, neither side served the other with a Section 6 notice or said it was proceeding under Section 6 of the RLA. Both sides recognized that the changes to the CBA sought by American were substantial.

To provide information to flight attendants regarding the negotiation process, Ward recorded a telephone hotline message accessible to union members. He stated that APFA was willing to make concessions because, "as dreadful as the Restructuring Agreement is, the Company's bankruptcy proposal -- that is what they would seek to achieve in bankruptcy from the court -- is far worse." APFA Hotline Message, April 4, 2003.

Also during this period, APFA issued an update to membership stating:

> The three labor unions, after exhaustive research by each union's economic advisors, have determined that [American] is in serious financial trouble. This situation is deteriorating rapidly. . . .
>
> The APFA Negotiating Table Team . . . [is] working tirelessly to come up with a consensual tentative agreement on a concessionary package. How much this package will be worth (as compared to the Company's $ 340 million request) has not yet been agreed to by the

> parties. However, [American] indicates it needs the full amount to avoid a bankruptcy filing. . . .
>
> If . . . a package is concluded then it will then be submitted to the membership for a ratification vote. . . . If any single group rejects their respective package, the Company represents that it will likely be filing for bankruptcy.
>
> The APFA Leadership believes avoiding bankruptcy is in our membership's best interest. Bankrupt airlines often shrink operations, furlough employees and use the bankruptcy laws to abrogate parts of union contracts. Use of the Section 1113 process of the federal bankruptcy law may cause greater sacrifices in areas we do not necessarily desire.
>
> Because APFA is acting responsibly, it is seriously attempting to avoid bankruptcy. . . . [W]e still believe that obtaining an agreement between the parties is likely to be better than leaving the decision to a bankruptcy judge. Because of this, we will try to reach a deal regardless of how pessimistic things look.

American provided the restructuring terms on a take-it-or-leave-it basis. In mid-March 2003, American established unilaterally an April 15, 2003 deadline for APFA, TWU and APA to complete their respective membership ratification processes on the agreements they were required to reach with American by March 31, 2003, and informed the three Unions that, if they did not provide ratified agreements by the April 15, 2003 deadline, the Company would file for bankruptcy. Ward

informed American that the APFA Constitution required a 30-day balloting period. American refused to extend the deadline.

During discussions in the second half of March, American adhered to its previously-stated position that APFA would have to provide $ 340 million per year in cost savings to the Company and that anything less was unacceptable. During this time period, the Company stated that the Union could make proposals regarding the specific concessions to be included in the agreement, but the overall package would have to result in total annual savings valued by the Company at $ 340 million. APFA attempted to interject its own terms, but American was not receptive to them. Rather, American provided APFA with a list of possible concessions and placed a value on each. Steve Boilini, a flight attendant and member of APFA's negotiating committee, interpreted the BOD's direction to "take any and all necessary actions needed to reach a negotiated consensual agreement" to mean that "the negotiating team wasn't going in to actually negotiate. . . . [W]e were going in to do anything we could to make sure American Airlines did not go bankrupt." Boilini Dep. 25. Mr. Boilini understood it was the negotiating team's purpose to conclude an agreement. *Id.* The APFA leadership felt that American had "a gun to our heads." Ward Dep. 119-22. The situation "was nothing [APFA] had ever experienced before." Liz Mallon (member of APFA BOD) Dep. 113-14.

To meet the $ 340 million figure solely through wage cuts would have required reductions in flight attendant wage rates of 35%. APFA determined to avoid a wage reduction of this magnitude, demanding that

alternative concessions be included in the overall agreement. During the last two weeks of March 2003, APFA proposed contractual "snapbacks" providing a return to pre-concession terms and conditions of employment during the life of the agreement, as well as significant pay raises while the agreement remained in effect. The Company refused these requests because it viewed the concessions, not as a short-term change, but "a change in how the airline was going to operate in the future. . . . [W]hat [American was] doing would permanently change the company in light of what was happening in the industry." Jeffrey Brundage (former American Vice President of Employee Relations) Dep. 342-43. APFA also proposed other "upsides" for the flight attendants, e.g., unlimited recall rights for furloughees and a profit-sharing program, both of which were rejected by the Company. The Company sought to eliminate the flight attendants' defined benefit pension plan. APFA resisted these changes.

B. The Company's Bankruptcy Preparation and Section 1113 Proposal

The Company retained legal and financial advisors to help prepare for a bankruptcy filing. The Company also discussed with a group of financial institutions an arrangement to provide $ 1.5 billion in financing for the Company's operations while in bankruptcy. The Company intended to file for bankruptcy on April 15, 2003 if all three Unions did not ratify agreements by that date.

Shortly before the Company's March 31, 2003 deadline for the three unions to reach agreements with American, the Company provided APFA with its "§